THE

MONTHLY LAW REPORTER.

JUNE, 1865.

THE ORIGIN OF MAGNA CHARTA.

It is one of the curious phenomena of history, that in an age of feudal barbarism and debasement, one of the most unprincipled, false, and cowardly of all the English kings, should have promulgated, in a systematic form, a declaration of personal rights to his subjects, which is regarded with so much reverence in the light and liberty of the nineteenth century. And it is equally a matter of surprise that a body of rough, unlettered barons, surrounded by bodies of slaves, to whose minds personal freedom was as strange as the luxuries of modern civilization, engaged in incessant broils and petty wars with each other, and with the crown, who knew little law beyond the might of the strongest, and the only restraint upon whose morals was a slavish fear of the church, should have come together and have deliberately dictated or accepted a declaration which affected not merely their own privileges and immunities, but those of the future citizens of a constitutional monarchy, having its essential foundation in the then powerless and unheeded commonalty of England.

The Chronicles of England furnish us the fact that an instrument bearing date on Trinity Monday, June 15th, 1215, was executed by King John, and that that instrument was called *the Charter;* but it requires us to go back anterior to that date, if we would learn the causes which led to such a step, or the sources from which its provisions were derived, as well as to study the condition of the people of England at the time it was granted.

The English common law, which forms, also, a principal element of our own, is a piece of Mosaic, in which the Saxon

laws and institutions form an essential constituent. It is very remarkable that after four hundred years' occupancy of the island, the Romans left so few traces of their laws and customs. And though the Danes, during the twenty-four years while they occupied the kingdom, introduced many of their laws, some of which found their way into the English law, its substratum was, after all, deeply and permanently laid in the laws, sentiments, habits and opinions of the Saxon race, who held the kingdom for six hundred years prior to the Norman Conquest.

In a period and among a people when commerce, beyond that of the freebooters of the sea, was unknown, and almost the only property recognized was lands and implements of husbandry, with the beasts of the field, and the slaves attached to the soil, and whose only business of life, moreover, was war or agriculture, we should look in vain for the varied rules and systems of law to which modern commerce and civilization have given rise. And it is a matter of surprise now, that no one can tell, at this day, how far the feudal system had obtained a foothold among the Saxons before the Norman Conquest. But in some things there were characteristic rules recognized by the Saxon law which were justly held in high favor; lands were freely alienable, and might be devised by the owners by last will. Justice was cheaply and conveniently administered, and a pervading, though perhaps not well-defined sense of personal right and freedom was diffused among the people, which answered to the more modern and refined notions of *civil liberty*. There was, moreover, an instinctive love of their own local laws and institutions, to which they clung under every reverse, and returned to, as soon as the adverse circumstances which had suspended the enjoyment of these had been overcome. The moment the Danes were expelled, the natives resumed their former laws, while they retained some of the Danish customs which had been found congenial to the national taste. This respect for their laws must, of course, have been chiefly traditional, since the capacity of reading and writing was too rare to be regarded as a national trait. One of the most popular acts on the part of the great and wise Alfred was the framing out of these a code which, from that day, has been regarded by the English with veneration, with the exception of the period while the Danes held the power, and after the arrival of the Normans, till they became amalgamated into the nationality of England. The work begun, but

left unfinished by Alfred, was completed by Edward the Confessor, in the body of laws which he compiled, and to which the Saxons were in the habit of recurring on all occasions, after the introduction of the feudal law of Normandy, in contrast with the slavish and oppressive institutions which their conquerors had imposed upon them, till a respect for these ancient laws became a prevailing sentiment in the kingdom; and on more than one occasion the reigning monarch sought to win the favor of the people, by recognizing these as a part of the laws of England.

The feudal system came in, in full force and vigor, with the Conquest; it nowhere prevailed in a more absolute form than in Normandy, and was enforced with the greatest rigor by William and his followers, who took the name of *barons*, the Norman term which was applied to those who were his *men*. He seized upon the lands of Harold and his followers, under the pretence that they were subjects of confiscation for their treason towards him. He sought out all the *Land-Bocs* or records of titles on which he could lay his hands, and caused them to be destroyed, and, by forcing the leading Saxon landholders into insurrection and rebellion, by his outrages and oppressions, he made it a pretence for seizing upon their lands, and in these ways converted most of the kingdom, with the exception of Kent, and some other smaller portions of it, into a state of feudal subordination and dependence upon himself, as the Lord Paramount of the realm. These lands he granted out, in return, to his chief barons, giving to some more, and others fewer manors in number, according to his favor or caprice, requiring from them the services which a feudal vassal owed to his lord; and they, in turn, divided these lands to their own vassals, from whom they exacted a similar return in services.

The whole system of feuds was one of arbitrary and irresponsible despotism. The State, as a body politic, with its State laws, and its general system of protection for the many against the arbitrary power of the few, was all but ignored. Instead of this, the kingdom was divided into a multitude of little baronies, each with its own court, and its own system of justice, without any appeal, in ordinary cases, from the domination of some petty lord to any immediate superior, for protection or relief. While it left the mass of the people in a state of villanage, which was another name for slavery, the freeholders of the land were themselves subordinate to an immediate or remote superior, to whom they owed fealty and

homage. Add to this, the hatred and jealousy with which the Saxons regarded their feudal masters, and the contempt and apprehension which the Normans entertained towards the Saxons, and we are not at a loss for the causes of those incessant outbreaks, insurrections, and domestic wars which fill up the chapters of English history for so long a period after the Norman Conquest. The Saxons were not strong enough to control the policy or laws of the kingdom, and yet they were strong enough to make themselves of sufficient consequence in any of these outbreaks, to be taken into account in measuring the power of any faction or party. There was a steady persistency on their part, in insisting that the laws of Edward should be restored; and so strong were they felt to be, that in the fourth year of William's reign, he solemnly swore to grant this request. But the enormous burdens of feudal tenures still continued; and the simple forms of Saxon judicature gave place to the Aula Regis, with the despotic powers of a Chief Justiciary, imported from Normandy, with Norman notions of law and justice. The lands of the kingdom were declared inalienable, except by the assent of the superior lord, and upon paying him therefor a heavy sum under the name of a *fine*, they could not be devised by last will, and upon the death of the owner his estate descended to his oldest son, by the law of primogeniture, which had come in with the Normans; and, all over the kingdom, the people were reminded of the presence of their masters, every night, by the tolling of the *curfew* bell, whose very name, "*couver-feu*," was borrowed from the Normans, at which every fire and light were to be extinguished. William, and his son Rufus, were able to keep down the restless spirit to which those causes of irritation gave rise, by the force which they had at their command, and Henry I., by marrying a descendant from the Saxon line of kings, did much to allay the jealousy of the races. No material change took place in the three succeeding reigns, except a gradual assimilation of Norman and Saxon, which would naturally arise from being natives of the same localities, and from occasional intermarriages, and from the habit of traditional reverence which grew up, in time, for the ancient liberties and institutions of the Saxon period. John, as successor to these kings, came to the throne in 1199. Mean, treacherous and cowardly to the last degree, his reign was one continued struggle between himself and his subjects; on his part to deceive, oppress and tyrannize over them, and on their part to interpose a barrier against his abuse of power, and disregard of law. In 1213 he

was absolved from the excommunication under which he had laid, by Archbishop Langton, and then made solemn oath that he would restore the laws of Edward. In August of the same year, there was a meeting of the prelates and nobility of the kingdom at St. Paul's, when the archbishop informed them that he had discovered a charter granted by Henry I., under which they could re-establish their ancient liberties. The barons heard this with delight, and bound themselves, before the archbishop, by oath, to contend for these liberties, even to death itself, whenever opportunity presented. At a meeting of the earls and barons held at St. Edmundsbury, twelve months afterwards, this charter was produced, and they renewed their oath, at the high altar, to make war upon the king, if he refused to grant the liberties therein contained. They accordingly demanded a confirmation of that charter. The king asked a respite in which to decide, and also desired to be informed what the liberties were which they required him to grant. Whereupon they sent him a schedule consisting partly of what were found in Henry's charter, and partly of the laws of Edward.

This traditional account of the incipient steps towards obtaining the great charter, we are informed by Blackstone, comes from Matthew Paris, but has been adopted as true by modern historians.—(2 *Black. Trut.* vii.)

One thing is true, there was a charter granted by Henry I. which embraced many of the articles which afterwards found a place in Magna Charta, and the reverence for the laws of Edward was an ever active principle in the minds of the English people, who associated these laws with a state of freedom, in marked contrast with the feudal bondage in which they were then held; although it is not so easy to perceive why the barons should favor opinions more or less directly hostile to their own power, unless it was as a means of enlisting the public favor upon their side, in the struggle which they were carrying on with the crown.

Blackstone, indeed, doubts the fact that this charter of Henry I. had been thus forgotten, and considers it more probable that its having been granted was rather a hint to the barons to require a charter from John, than that it furnished the materials for the charter which he did grant. But all historians agree in this, and it is the only point I wish to establish here, that the great charter of John was, for the most part, *compiled* from the ancient customs of the realm, or the laws of King Edward the Confessor, by which they mean the old com-

mon law, which was established under the Saxons, and before the feudal law had been introduced.—(2 *Bl. Tr.* xii.; *Co. Lit.* 81 a.) And I may add, what is known to every one familiar with the history of the common law, there has been in every stage of its progress an element of personal freedom, guaranteeing personal rights, and the security of person and property, which no other code could ever pretend to. The civil or Roman law was the emanation of imperial power, the canon, the dogmas of a self-constituted hierarchy; while the common law partook of the character of the sturdy, self-reliant men who sprung up in England after the overthrow of the Roman power, and were never wholly subdued till their influence culminated in the Puritanism of the Commonwealth, and the national emancipation from the tyranny of the Stuarts at the revolution of '88.

The charter of John, then, was not a deliberate and voluntary grant from a king of liberties and privileges to a confiding or even a suffering people. Nor, on the other hand, was it an original statement or declaration of a body of wise statesmen, profound thinkers, or learned and sagacious lawyers or politicians. What he yielded was done from fear, with a bad grace, a treacherous spirit, and in a cowardly manner; while the thing that he granted was a singular medley of personal and selfish purposes of the military leaders who dictated it, and of rights and privileges which the people, with whom they had little sympathy, had long regarded as something worth making any sacrifice to regain.

When, how, and where this charter was obtained, may be briefly stated, for in this history seems to be clear.

On the 20th Nov. 1214, the barons met at St. Edmundsbury and formed a league, swearing upon the high altar to wage war upon the king, and withdraw themselves from his fealty, till he should *confirm* by charter, under seal, the several liberties which they demanded. They accordingly came to London and made this demand. John at last agreed to answer by Easter. He immediately went to work to enlist the church on his side, and both parties appealed to the Pope. John moreover took upon him the cross, and vowed to undertake an expedition against the infidels in the Holy Land. But he accomplished little by this hollow-hearted appeal to the superstition of his subjects, inasmuch as Archbishop Langton was at the head of the confederacy against him.

The Pope favored the king's appeal to him, and wrote a letter to the barons and bishops, disapproving of any attempt to

extort favors by force from the king; but, fortunately, this letter did not reach England till after the time at which John was to make his answer to the barons' demands. Preparatory to this, the barons assembled with some two thousand knights of their retainers in their train, and marched to Brackely, about fifteen miles from Oxford, where the king was. This was on the 27th April, 1215. The king thereupon sent to them to ascertain precisely what liberties they claimed, and they sent him back a schedule, with a threat that if he did not grant them they would seize his castles; and they referred again to the charter of Henry I. The king was greatly indignant at the demand, and replied to them by an oath that he never would grant their demands, and the barons thereupon took measures to enforce them. In May they disclaimed their allegiance to John, and obtained absolution therefrom by the favor of one of the canons of Durham; and, in the end, took possession of London on the 24th of that month. The king found himself abandoned by his followers, and all his lords but seven, and concluded to yield to the requirements of the barons, and proposed a meeting for that purpose. The 9th June was fixed for the meeting, but they did not come together till the 15th. The conference then opened, and was continued till the 19th, when the heads of the agreement, to which the king consented to accede, were reduced to the form of a charter, and sealed with his great seal. Original duplicates of this were prepared and deposited in every diocese in the kingdom, several of which are still extant, and two of them are now in the British Museum.

This, in brief, is the history of this famous instrument, which has from that day been regarded as the *great charter* of English liberties, and held in the highest veneration by every Englishman, wherever he was to be found. The English colonists brought with them this sentiment in all its freshness and vitality; and, through the long struggle with the mother country, constantly referred to it as the great palladium of their rights as Englishmen. It enters largely into the declaration of rights in the constitution of Massachusetts and other of the States, and furnished the elements of thought, if not the forms of expression, which sprung up in so many shapes in the earlier declarations of American liberties.

Its effect in England was important and immediate in one respect, which is noticed by Mr. Macaulay in his history. It united and merged the hitherto discordant elements of Saxon and Norman races into one nationality. A common suffering

under the tyranny of a king who had proved himself false to all his subjects united them into a common struggle for redress; and the constant vigilance which was still requisite to guard the boon which they had thus won against the ill-concealed treachery of the king, operated to cement the now English *people*, nobles and commoners, Normans and Saxons, together, into what ere long became a homogeneous whole.

The work, however, seems to have been but half-accomplished in the minds of the men of power in England when they had the signature and seal of only one king. They do not seem to have regarded his act as necessarily binding upon his successors; and we accordingly find that within a fortnight after the successor of John, Henry III., was crowned, although he was then but nine years of age, he ratified and renewed this charter with great solemnity, but with sundry modifications which the circumstances of the time seemed to require. This was repeated several times during the reign of Henry III., and by successive sovereigns, till the same had been gravely and solemnly confirmed more than thirty times down to the time of Henry V.; there being a disposition on the one side to evade, and on the other, as often as they had the king sufficiently in their power, to insist upon his republishing or reaffirming the binding obligation of an instrument which took a variety of significant names, such as "Charta Libertatum," and "Communis Libertas Angliæ," or "Libertatis Angliæ," "Charta de Libertatibus," "Magna Charta," and the like.[1]

The copy of the charter commonly found in our law books purports to be that which Henry III. granted in the ninth year of his reign, and is sufficiently identical with that of John to be referred to for an explanation of its provisions. Before doing that, however, I ought to speak more fully of the place at which the original was signed, now so famous in history, known as *Runymede*. It is said to have taken its name from "*Rune*," the Saxon for council, and "*Mede*," or, "the council meadow," where formerly the Saxons had held their councils. It is a meadow of about one hundred and sixty acres, lying along the Thames, upon the Surrey side of the river, about eighteen miles from London, near Egham, Staines, and Windsor Park. In the history of Surrey it is described as still being a meadow, which is turned into racing ground in August of each year. In the Thames there is a little island which is the traditional spot upon which the charter was actually signed;

[1] Coke Litt. 81 a.

and upon the bank of the stream, upon its opposite side, stood the famous tree called the "Ankerwyke Yew," which is still green and fresh after the lapse of six hundred and fifty years.[1]

When we turn our attention to the provisions of this famous charter, we ought not to allow ourselves to form an inadequate estimate of what we have a right to expect from the men of that day. A large proportion of the people of England were little or no better than slaves. Villanage was the condition of her laboring classes. There was a feudal aristocracy throughout the kingdom, but the grand council of the State included only the bishops and the barons, while there was nothing like a representation of the commons in Parliament. And, in the absence of everything like an educated class of men, and without trade and commerce, and in the very infancy of the arts, there were few interests for which provision could be made beyond the feudal rights, duties, and burdens connected with the holding and culture of the land, the privileges and immunities of the church, the personal security of the freemen, and the tardily-recognized claims to anything like consideration of a class of tenants who were gradually rising above a state of villanage or serfdom.

The charter contains thirty-eight chapters or sections, some of which are exceedingly brief. They do not follow any orderly arrangement in subjects, and the terms in which they are expressed are mostly so technical, and much of them so nearly obsolete, that it is impossible now to understand them, unless read in the light of surrounding circumstances, and with the knowledge of the meaning of the phrases and forms of expression in which they are couched. It would occupy too much space, as well as be too severe a tax upon your patience, to attempt to analyze these chapters. In fact, the course of events, and the change in the laws and customs of the kingdom, have rendered most of them of little interest beyond being matters of history.

The first section, as a peace-offering to the church, guarantees the whole of her rights and liberties, and declares them to be inviolable; and to all freemen of the realm the liberties which it then proceeds to enumerate. And this, it is said, is done "unto the honor of Almighty God, and for the salvation of the souls of our progenitors and successors, kings of England, to the advancement of holy church and amendment of

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[1] 3 Hist. Surrey, 224; 1 Knight's Hist. Eng. 347, 351.

our realm." I should have said that the charter was written in Latin, though law proceedings had been in the Norman-French language from the time of William the Conqueror, and continued to be till Edward III., when they were required to be recorded in Latin. And this continued to be done for about four hundred years, till the time of the Commonwealth, when the English was substituted as the law language of the kingdom.

The onerous burdens imposed by the feudal law upon the land-holders of the kingdom form a prominent subject in several of the chapters of the charter; and guards and protections against abuse were interposed between them and the king, to whom, as lord paramount, they were due.

In the first place, all proper feuds were those which were held by a vassal on condition that he performed certain military services, which was called knight-service, and was finally abolished, with all feudal tenures, in the time of Charles II. Many, if not most of the principal baronial manors, were held directly from the crown, or, in technical terms, *in capite*. Among these feudal services, or rather fruits of feudal tenure, were *Relief*, *Wardship*, and *Marriage*. Reliefs were sums of money which an heir had to pay to the lord for the privilege of coming into the enjoyment of his ancestor's feud. At common law this was a fixed sum, but by the grasping disposition of the late kings this had become extremely burdensome and oppressive.

Wardship was a still more oppressive burden. By it, if an ancestor who was the king's tenant died leaving a minor heir, the crown took possession of his lands, farmed them out, making the most it could out of them, leaving the minor at his majority an estate stripped and wasted, and all he had received in return had been his own personal support.

Marriage was a still more odious fruit of feudal tenure. By it, if the vassal left a female heir under a certain age, the lord had a right to sell her in marriage for the best price he could get. In one case the Earl of Warwick received the sum of £10,000 for his consent to the marriage of his infant ward. If the infant refused to carry out the lord's bargain of her person and estate, she forfeited to him the amount he could have realized from it; and if she married without his consent, she forfeited double the value of such marriage.

The barons, being vassals of the crown, and owing military service for their lands, were immediately interested to mitigate these burdens and oppressive exactions; and several of the

chapters of the great charter were aimed at these abuses. They struck at one of the principal sources of the income of the crown; and it is not, therefore, surprising that the king should have reluctantly yielded to the required reform.

Another class of evils under which the freemen as well as the feudal landlords had been suffering, was connected with the administration of justice. The King's Bench was theoretically held by the king, and accompanied him wherever he went. Its writs and proceedings were returnable "ubicunque fuerimus in Anglia." At the head of this court there had been an officer called the Chief Justiciar,—generally imported from Normandy,—having the notions of a man educated in that feudal and now foreign country, clothed with great power, and exercising it with unrelenting severity. Not only was a suitor in this court obliged to follow the king wherever he might choose to go, and thereby be subjected to enormous expense, but when his cause came to be tried he found, practically, a foreign tribunal, in which justice was openly sold; and he could feel no assurance of obtaining his right, however clear. There were, also, courts held by inferior officers, in which matters of the gravest moment, even cases of a capital nature, were tried by men wholly incompetent by education or character to secure a fair or satisfactory result. In connection with this was a most important circumstance which, at that period of the law, might seriously affect the party arraigned upon a criminal charge. By a concession to the sanctity of the church, and from a regard to the sacredness of the office of priest, the courts of common law yielded their jurisdiction over clerical offenders to the trial and censure of the bishops and higher officers of the church. In determining who should be admitted to this exemption from punishment under the criminal law of the realm, inasmuch as what little learning there was had been monopolized by those in holy orders, the test applied if any claimed the privilege or "benefit of clergy," as it was called, was to place in his hand a book, and require him to read. If he succeeded, he escaped punishment for most of the many offences known to the law, and several of them capital. The mode of doing this is thus described by an old author:

"The bishop must send to every jail-delivery a proper commissary. If the prisoner asks his clergy, the judge commonly giveth him a psalter, and turneth to what place he will. The prisoner then readeth as well as he can (God knows often very slenderly). Then he asketh the commissary, *legit sit clericus?* The commissary must then answer, *legit* or *non legit.*"

Now, as the bishop would not attend an inferior court, if a man were held for trial, even for his life, in one of the courts held by the sheriffs or coroners, or other inferior officers, he had no chance to get the benefit of clergy; and this, of course, operated most unequally upon the persons charged with offences in the kingdom.

Other evils had grown up, and defects had developed themselves in the administration of justice, which the barons sought to obviate and correct by means of the charter. Thus the court of common pleas, in which most of the actions between subjects were heard, was thereby made stationary, and practically fixed at Westminster. Questions of title to lands were to be tried in the county where the land lay, and sheriffs and other inferior officers were prohibited from holding courts for the trial of considerable crimes. Nor could a man's land be taken for his debt due the crown, so long as he had goods which might be seized.

It will be recollected that in the discussions preliminary to our Revolution, constant reference was made to the Magna Charta as a standard of the civil rights of the colonists; and that one of the great causes of complaint was the power asserted by the crown of compelling a citizen of one of these colonies to answer for acts done here before the courts of England, so remote from the vicinage of the transaction.

One or two things in the charter may be referred to as illustrative of the state of intercourse and society in England at that time. It guards towns and freemen from being distrained to make bridges or banks "but such as of old time"; as they had been heavily taxed during the previous reigns under the pretence of maintaining fortresses, bridges, and the like public works.

No man had a right by the charter to claim exclusive control of a river merely because he owned the land upon its banks; and fishing-weirs then existing in the Thames, Medway, and other rivers in the kingdom, and which effectually interrupted their navigation, were, by the charter, to be removed. The significancy of these provisions was in the fact that these streams were the principal means of transporting commodities to and from market; and these weirs, among other things, prevented floats, or, as we should say, rafts, of wood from coming down these streams to supply the towns on their banks with fuel before the days of coal-mines. And yet it was nearly two hundred years after this before the weirs in the Thames

between London Bridge and Staines, near Windsor, were wholly removed.

There is one clause in favor of extending protection to foreign merchants coming to England, securing to them safe ingress and egress, and passage through the kingdom. And another provision favorable to trade was requiring all measures of quantity and weight to be uniform.

An important, and, under the circumstances, a remarkable provision in the charter was aimed at the grasping spirit of monopoly and aggrandizement of the church. In an age of violence and the lawless abuse of power, the passions of men often led them to a course of life for which they felt it necessary to make some expiation in order to make their peace with the church, and win an entrance into heaven at last. No readier way offered itself than, like a man's giving up his vices after his power of indulgence has been lost, to leave to the church the fruits of a life of rapine and injustice. And in this way the monasteries and other church establishments were engrossing all the lands in the kingdom. As these church lands escaped many if not most of the feudal burdens which fell so heavily upon the other lands in the kingdom, the barons insisted upon an express clause in the great charter prohibiting all persons from giving their lands to religious houses. This is the origin of the laws still in force in England against *mortmain*, as it is called, or the falling of lands into the *dead hands* of ecclesiastical corporations.

If, now, we ask what provisions were made in this charter for the liberties, safety, or protection of the people, we shall find their number few, but at the same time most interesting and important in their bearing. Some of these are rather by indirection than any explicit declaration of what they intend to secure. Widows were relieved from the payment of feudal dues, like other tenants, in coming into possession of their dower lands, and were, moreover, permitted to occupy the mansion-houses of their husbands for the period of forty days, called a widow's "*quarantine*," after the death of their husbands,—a principle which has been substantially retained ever since, wherever the common law of England prevails.

There is a single clause only relating directly to that oppressed and down-trodden class then so numerous in England, called villeins. It is connected with a clause limiting the extent to which a freeman might be amerced, and is in these words:— "And any other's villein than ours shall be likewise amerced, saving his *wainage*, if he shall fall in our mercy." It is the

protection of his *wainage*, derived from the Saxon *wagna*, or *wain*, that is significant here, as it was by means of that that villeins were able to do the service of carrying out manure and other like work upon the lord's land, the doing of which was the condition of the feeble tenure by which he held his land. It was, in other words, protecting him from being stripped of the means of earning a livelihood; and it is upon this principle that to this day the tools of a mechanic are free from attachment, and the tools of trade and beasts of the plough, necessary for cultivating the land, are exempt from distress in enforcing the payment of taxes. It was in the case of the villein a boon, small in amount but of inestimable value to him, as it secured to him the means of subsistence. But even this favor, small as it was, was withheld from the tenants of the crown lands.

In process of time, however, villanage disappeared in England, by a sort of outgrowing of it by the people, so that the general provisions of the charter in favor of the subjects of the crown, came to embrace, in theory at least, the entire people of the realm.

One provision in the charter had several of the properties of a process of Habeas Corpus; by it any one imprisoned upon a capital charge might have it inquired into whether the charge was made from hate and malice, or upon good and sufficient ground, and this process was to be issued without charge to the party applying for it.

But the great and significant clause of the Charter, upon which its claim to the admiration and veneration of every successive age rests, is the 29th chapter or section; it is so broad in its terms, and extensive in its application, that it may be justly regarded as embodying the great principles of civil liberty, as well as of personal rights and protection, under a wise and just administration of law, which have their foundation in the English common law. I follow the words of Lord Coke in the very awkward and inelegant translation of this clause. "No freeman shall be taken or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed or exiled, or any otherwise destroyed, nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land." The original closes with these noble and often quoted words: "Nulli *vendemus*, nulli *negabimus* aut *differemus* justitium vel rectum."

We here have in epitome the elements of the free British Constitution, which was more fully developed and declared

after that long struggle with the Tudors and the Stuarts, in the Habeas Corpus Act of Charles II., and the Bill of Rights of William and Mary, one of the crowning acts of the Revolution of 1688. We have, in fact, in this clause of the charter the germinal principle of a process of Habeas Corpus, which is, after all, but the declaration of an original principle of the English common law; and we have, moreover, what I apprehend is the first public authoritative recognition of the right of trial by jury.

It is singular how little is known of the first introduction of trial by jury into the proceedings of the English courts. Barrington, a writer upon the early English statutes, quotes what he regards as very high authority, showing that it was unknown to the Saxons, and he favors the idea that it was introduced into England about the time of Henry II.—(*Bar. Stat.* 21, 22.)

Be that as it may, from that day trial by jury has been deemed one of the great safeguards of English liberties, and one of the last to be surrendered. So long as a man's life, property and liberty cannot be taken from him, in the words of this charter, "nisi per legale judicium parsium suorum vel per lege terræ," he may feel that he is under the guardianship and protection of the whole body politic, and in the vigilance of the law has the surest safeguard which human invention has ever devised.

In the closing language of the chapter which I have cited above, we have, in view of the history and condition of the times, one of the noblest declarations in the history of jurisprudence. Made at a time when justice was openly hastened or delayed for money, or withheld in obedience to the dictates of royal power, and which state of things continued to a greater or less degree down to the English revolution, it did but anticipate, by centuries, that advance of the nation and the race, to which they have attained in the progress of civilization and refinement. The words "nulli vendemus, nulli negabimus aut differemus justitiam vel rectum," were adopted by our own Supreme Court as the motto of the seal of that court: and the fidelity with which they have regarded it, in the exercise of their high functions, while impressing it, legibly, upon the processes which they issued, can hardly fail to make one conscious, as he reflects upon a fact so suggestive, of the undying force and dignity of that noble declaration, when a thought, thus elicited by the hardy and unlettered vassals of a

weak and contemptible monarch, of then more than half barbarous England, should stand out, as it were in relief, in the proceedings of a court of common law jurisdiction of the highest dignity, administering justice to a million and a half of intelligent freemen, speaking the language of England, in a land of whose local existence even the wisest men of that day had never dreamed, it is but another illustration of the undying nature of noble thought, when clothed in a language of fitting and becoming dignity.

The circumstances under which Magna Charta was granted are in many respects widely variant from any under which we can conceive that Americans can be called upon to act; but the lesson taught by an examination into the origin and character of this remarkable instrument, can never be too carefully learned, too well remembered, or too faithfully carried out, when it is desired to secure the protection of a numerous, but individually less powerful class, against the tyranny of active, influential, and unscrupulous superiors.

RECENT AMERICAN DECISIONS.

United States Court of Claims.—March 6, 1865.

O. B. & O. S. Latham *v.* The United States.

The opinion of the court was delivered by

Casey C. J.—The claimants, on the 25th day of July, A. D. 1855, entered into a contract with the Secretary of the Treasury, acting on behalf of the United States, to build a custom-house at Buffalo, in the State of New York. The contract was made subject to plans and specifications annexed to and made part thereof. The United States afterwards directed the building to be enlarged by adding twenty-five feet to its length, and three feet to the height.

On the 7th day of April, 1856, they entered into a similar contract with the same officer to build a like structure at

Oswego, in the same State, of the original size and plan of the Buffalo house. During the progress of the work the government directed several changes and deviations from the plans and specifications, in the materials used, and in the mode of dressing and laying the stone.

To recover the value of the extra work, and for the increased expense occasioned by the departures from the terms of the contracts, the claimants brought suit in this court. The case was heard before the reorganization of the court, and resulted in a report to Congress in favor of the claimants for the sum of thirty-six thousand four hundred and forty dollars and ninety-four cents ($36,440.94). On the 3d March, 1863, an act was passed increasing our finding to the sum of seventy-four thousand five hundred and eighty-three dollars and thirty-seven cents ($74,583.37).

In the contracts already referred to, it was stipulated on the part of the United States that for the custom-house at Buffalo they would pay to the claimants the sum of eighty-one thousand three hundred and forty-five dollars, "good and lawful money of the *coin* of the United States"; in the contract for the Oswego building, the sum of seventy-seven thousand two hundred and fifty-five dollars, in the same kind of money. And for the erection of these buildings various appropriations were made, the last of which was for one hundred and ten thousand dollars, by the act dated 1st July, 1857; of which appropriations there remained unexpended at the time of the passage of the act for the relief of the claimants of the 3d March, 1863, over eighty thousand dollars.

On the 9th March, 1863, the claimants appeared at the Treasury Department, and, by virtue of this act and the contracts upon which their claim was founded, demanded payment of the amount in the "lawful money of the coin of the United States." The Secretary of the Treasury refused to accede to this demand, and offered payment in the legal tender treasury notes of the United States, issued under the authority of the act of 25th February, 1862. The plaintiffs received these under protest, to the amount named in the act. To have made these notes equivalent to coin in the gold market of that day would have required the further sum, in treasury notes, of forty-three thousand six hundred and thirty-one dollars and twenty-six cents ($43,631.26). It is to recover this latter sum that they bring this suit, and they base their right to recover on the following grounds:

1. That the act of 25th February, 1862, authorizing treasury

notes and making them a legal tender, is unconstitutional and void.

2. That by the express terms of the contracts they were entitled to be paid in "lawful money of the *coin* of the United States."

3. That the appropriation out of which payment was directed to be made to them was enacted by Congress when gold and silver coin was the only money in the treasury, and they were entitled to the identical money so appropriated, or its equivalent.

The Act of Congress authorizing treasury notes, and making them a legal tender, was approved the 25th February, 1862, and is entitled "An act to authorize the issue of United States notes, and for the redemption or funding thereof, and for funding the floating debt of the United States."

The first section authorizes the Secretary of the Treasury "*to issue, on the credit of the United States*, one hundred and fifty millions of dollars of the United States notes, not bearing interest, payable to bearer at the treasury of the United States, and of such denominations as he may deem expedient, not less than five dollars each. * * * Such notes herein authorized shall be receivable in payment of all taxes, internal duties, excises, debts, and demands of every kind due to the United States, except duties on imports, *and of all claims and demands against the United States* of every kind whatsoever, except for interest upon bonds and notes, which shall be paid in coin, and shall also be lawful money and a legal tender in payment of all debts, public and private, within the United States, except duties on imports and interest as aforesaid."

I. The first question raised is, does Congress possess the power, under the Constitution, "to emit bills of credit," and make them a legal tender in payment of all debts, public and private?

The claimants' counsel contends that the only legal currency known to, or authorized by, the Constitution of the United States, is metallic coin. This, it is argued, appears from—

1. The power expressly given to Congress "to coin money and regulate the value thereof, and of foreign coin"; and that this is the only power conferred upon Congress in the Constitution to provide a currency.

2. It is a power which admits of no incidents, or choice of means. It is a single, specific act.

3. That the power must be interpreted by the natural and common import of the words in which it is conferred.

4. That the Constitution is in nowise changed by a state of war. The power must be granted, or it cannot be exercised.

5. The words "coin," and "to coin," have a certain and fixed meaning. "Coin" is a piece of gold or silver, or other metal, stamped by authority of the government, in order to fix its value, and is commonly called money; and "to coin" is to stamp metal as money. The Constitution having used these terms, excludes all other kinds of money. *Expressio unius est exclusio alterius.*

6. The Amendments to the Constitution also exclude any power to make a paper currency. This power not being expressly granted, its exercise is prohibited in express terms by Art. 10 Amendments.

7. The power cannot be inferred from that clause which prohibits a State from emitting bills of credit and from making anything but gold and silver coin a legal tender in payment of debts; for a prohibition to the States does not imply a grant to Congress.

8. A creditor of the government is entitled to present payment in money, not in promises to pay at a future time.

Such is a synopsis of the positions assumed by the claimants' counsel on the leading question in the cause. It is a question of great and transcendent importance. Should these positions be sustained by the courts of the United States, it would in all probability involve the government in financial ruin, if not in hopeless bankruptcy. It would paralyze if not entirely arrest its efforts to suppress the rebellion now being waged against its Constitution and laws, for want of the necessary means to prosecute the war. It would equally destroy, for a time, trade, commerce, and private enterprise, and produce panic and prostration in every department of business. And all this would be accompanied with the loss of character and credit both at home and abroad, and bring us national humiliation and disgrace before the civilized world.

In view of such consequences, an interpretation which will produce them should not be adopted unless constrained by overruling necessity. And that any interpretation will produce great inconvenience and injury is always a reason for rejecting it, where any other reasonable construction can be given which will avert them. The interpretation which we think would be followed by such injurious if not disastrous results, is professed to be made upon the plain, natural meaning of the terms of the Constitution. The declared objects of that instrument, however, are very different. "To form a more

perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity"—these were the ends aimed at by the framers of that great political charter. But if we are compelled to construe it in such a way that, instead of securing these objects, it is to be the source of the evils and calamities we have mentioned, then both the Constitution itself as well as the system of government it proposed to establish are a failure and a delusion.

Is this the true construction? Is the power to coin money confined strictly to a metallic currency? This is a very narrow interpretation of the words as used. The words "to coin" are defined by the best lexicographers, to stamp, to impress, to fabricate, or forge. And the word "money," both at the time of the adoption of the Constitution and since, was by no means confined to gold and silver, or any other kinds of metal. It was employed to designate anything authorized by the sovereign power of the State to be circulated as currency and used in the exchanges of trade and commerce.

At Hilary term, 31 Geo. II., A. D. 1758, in the case of *Miller* v. *Race*, 1 Burrow, 457, Lord Mansfield held that bank notes were money. In delivering the judgment of the court he says:—

"Now, they are not goods, not securities, nor documents for debts, nor are so esteemed; but are treated as money, as cash, in the ordinary course and transaction of business, by the general consent of mankind, which gives them the credit and currency of money to all intents and purposes. They are as much money as guineas themselves are, or any other current coin that is used in common payments, as money or cash."

The same was held in 1 Salk. 126; Cowp. 200: *Cumidge* v. *Allenby*, 6 B. & C. 373, S. C.; 13 Eng. Com. L. 202. And this doctrine has been generally followed in this country. In the case of *Hopson* v. *Fountain*, 5 Humph. 140, the court says: "*Money is a generic term*, and embraces every description of coin or bank notes recognized by common consent as a representative of value in effecting exchanges of property or payment of debts." In this case it was pressed upon the court that money was a technical term, meaning gold and silver coin. (*Young* v. *Adams*, 6 Mass. 182.) In the case of *Bayard* v. *Shunk*, 1 W. & S. 95, in the supreme court of Pennsylvania, bank notes were held to be money. Chief Justice Gibson says: "Our bank notes are private contracts without public sanction, like that which gives operation to the law-

ful money of the country; but it is also true that they pass for cash both here and in England, not by force of any such sanction, *but by the legislation of general consent*, induced by their great convenience, if not the absolute necessities of mankind. See *Northampton Bank* v. *Balliet*, 8 W. & S. 317.

Many more cases might be cited to show that the most eminent and enlightened jurists and the highest courts have held and regarded that as money which the practice and common consent of mankind has treated as cash in the current exchanges of trade. The same usage and practice prevailed in colonial times, and under the confederation in this country. Such paper issues entered largely into the currency at the time of the formation of the Constitution. Every colony and every State had had its paper currency, and in many of them such issues had been declared legal tender. The history of the "continental money" is familiar to all. These issues were not only all called money, but, what was more expressive and emphatic, they were passed off and used as cash in all departments of business and trade, and in the fiscal operations of the government itself. And from the condition of things then existing, it would have been not only injurious, but absolutely ruinous, to have, immediately upon the adoption of the Constitution, resorted to an exclusively metallic currency. Our best reason for believing that those who then administered the government, and had helped to form the Constitution, did not regard that instrument as restraining them to such a circulating medium, lies in the fact that they made little, if any, effort to shut out a paper currency.

For my own part, and speaking on this clause for myself alone, I would give to it a wider range and a more liberal interpretation. Taking the verb "to coin" in its general sense, as meaning to stamp, to impress, to fabricate, and the word "money" to denote everything that is used in current exchanges, and we have a clause empowering Congress to "stamp money," to "impress money," to "fabricate money," and to regulate and determine its value. And Congress, acting upon this theory that money derives its business and current value from the law, from the "image and superscription" it bears, and not so much from the material of which it is composed, have, by a succession of legislation extending from 1792 to 1857, exercised the power of changing the standards used in the coinage of the country, both as to the weight and fineness of the metal. If they can debase the precious metals used in coin, or even substitute the baser metals for them, it is difficult

to comprehend why any other material, even paper, might not be stamped, impressed, or coined, and thus be made lawful money, and represent the credit or sovereignty of the nation. Taking into view the history of the legislation of Congress, and the clause itself, I cannot admit that the power admits of no incidents or choice of means. As early as 1791 Congress incorporated the United States Bank, and made its notes a legal tender in payment of all debts due the government. The power of Congress to pass this law was canvassed with great ability by the first minds of the country, some of whom had helped to frame the Constitution. It was not only thoroughly discussed in Congress, but also in the cabinet of Washington, and the power of Congress sustained by Hamilton, in an argument which remains unanswered to the present day. The whole ground was again reviewed by Congress and the cabinet of Madison, in 1816, and the power re-affirmed. And in 1819, this long-mooted point was definitely, and, we think, finally put at rest, by the decision of the Supreme Court of the United States in the great case of *McCulloch* v. *The State of Maryland*, 4 Wheat.—not more by the respect and authority due to the high tribunal itself, than by the luminous and incomparable opinion of its great Chief Justice.

So from 1812 down to the present time, covering a period of more than fifty years, and almost two-thirds of our national existence, Congress has, upon various occasions and emergencies, authorized treasury notes in all respects like these issued under the act of 1862, except that the legal tender clause was restrained to debts due the United States. And the right and power to do so has not only not been seriously disputed, but it has been sustained by eminent judicial authority. The question came before the circuit court of the United States for Massachusetts, at May term, 1819, Mr. Justice Story presiding, in the case of *Thorndike* v. *The United States*, 2 Mason, 1. That eminent jurist says: "By the statutes under which treasury notes have from time to time been issued it is enacted that all such notes shall be receivable in payment to the United States for duties, taxes, and sales of public lands, to the full amount of the principal and interest accruing due on such notes. It follows of course that they are a legal tender in payment of debts of this nature due to the United States, and, by the very tenor of the acts, public officers are bound to receive them." This uniform and continued usage through so great a period of our national history, sustained by the executive, legislative, and judicial departments of the government, and acquiesced in and

approved by the people, ought reasonably to settle the question, even in a country where everybody claims the right to dispute everything. See 1 *Story on the Const.* § 408. And with this record and history of the subject before me, and the construction given to the Constitution, I am unable to say that the power "to coin money" means only to stamp certain metallic pieces.

It is also contended that no such power can be inferred in Congress from the prohibition laid upon the States against coining money or making anything but gold and silver coin a tender in payment of debts. Yet we think, when that prohibition is taken in connection with the power directly conferred upon Congress, that it is an argument in favor of the authority of the national legislature. The object of denying such a power to the States is very apparent. To secure anything like uniformity and stability in the currency, it was necessary that its regulation and control should be confided to a single legislature. It was equally necessary to enable Congress to carry out other great powers confided to it, such as the power to borrow money, regulate commerce, raise and support armies, and provide and maintain a navy; for these grants would have conferred but a naked and barren authority if the States might in practice have defeated their operation by establishing and introducing clashing and conflicting circulating mediums. If it had been intended to deny to Congress the power to "emit bills of credit, or make anything but gold and silver coin a tender in payment of debts," the prohibition would have been repeated in terms; for in the same section are contained the prohibitions against the passage, by any State, of any bill of attainder, *ex post facto* law, or the granting of any title of nobility. And to exclude any inference or implication, by the denial of these powers to the States, that Congress might pass such laws, the interdictions are repeated in terms, as limitations on the powers of Congress. The omission of any such prohibition, therefore, in the one case, while it is direct and explicit in the other, leaves the inference strong, if not irresistible, that it was intended to confer the power upon Congress, as well as deny it to the States.

But it is not necessary to rest the warrant for the exercise of the power in question upon a narrow view of the Constitution or any of its grants. In deriving it from the power "to coin money and regulate the value thereof," I have expressed only my own views. But we are disposed to place it on higher and broader ground, and give a wider effect to the grants of this

great instrument; and, in doing so, we consider that it expressly confers power—

"To lay and collect taxes, duties, imposts and excises."

"To pay the debts and provide for the general welfare of the United States."

"To borrow money on the credit of the United States."

"To regulate commerce with foreign nations and among the several States."

"To coin money and regulate the value thereof and of foreign coin."

"To provide for the punishment of counterfeiting the securities and current coin of the United States."

"To declare war;" "to raise and support armies;" "to provide and maintain a navy."

"To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions."

"To provide for organizing, arming, and disciplining the militia."

"To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or any department or officer thereof."

It is from great powers like these, embracing and conferring the highest attributes and functions of sovereignty, a government can possess or exercise, that the power in question is derived. We do not consider it necessary to take up each of these great substantive grants and show how the right to issue these notes might be inherent in or necessary to their exercise, but will refer to two or three of them.

To secure certain, safe, and prompt collection and transmission of the taxes, excises, and duties upon which the operations of the government depend, it is necessary there should be not only a currency, but that it should, as nearly as possible, be of equal value in every part of the country and in every State of the Union. The perils and vicissitudes of war always force the precious metals out of circulation to a great extent. The history of the wars in our own country, as well as the European conflicts, are proofs of this. The Bank of England in such a period suspended specie payments for more than a quarter of a century, between 1797 and 1823. During all that time her lawful and almost her only currency was the paper money of her banks. It is true, indeed, that it was not actually made a legal tender by Parliament, yet such were the difficulties and restrictions interposed by law to prevent any

person from obtaining or recovering anything else, that it virtually amounted to that without the express enactment. The same cause produced the same effect in our own country during the war with Great Britain, from 1812 to 1815. All the banks were compelled to suspend specie payments. The deficiency and want of a currency was supplied by a resort to large issues of treasury notes. The same system, more limited in amounts, was adopted during the Mexican war. And experience proves that, in the present condition and dependence of commerce and finance throughout the world, it is impracticable, if not entirely impossible, for any commercial nation to carry on a long, expensive war by a metallic currency alone. The perils of the times cause men either to hoard the precious metals or carry them abroad and invest their fortunes in foreign countries, to escape the hazards and burdens of their own.

The drain from these causes, as well as the greater amount of currency needed to supply the wants of the government, must be furnished by increased issues of moneyed institutions, or by a currency based on public credit. The first, being State institutions, and possessing only local credit and currency, would fail to supply the country what is needed—that is, a medium in which the revenues of the government could be collected and its expenditures disbursed, possessing equal credit and equal value all over the country. And this can only be effected by issuing such a currency under the authority or upon the credit of the United States. And, without the power to provide and secure such a medium, the right to levy and collect taxes, &c., would, under the circumstances referred to, be fruitless and nugatory.

As a means "to borrow money on the credit of the United States," its direct sanction may be found in the express grant of the constitution for that purpose.

Each individual who takes from the government or comes into possession of a treasury note, is to that extent, and while he retains it, a holder of the loan of the United States. The power to borrow "on the credit of the United States" gives express authority to Congress to pledge that credit in such way as they may deem best adapted to obtain the loan and secure the lenders. Why "the credit of the United States" may not as well be pledged in a treasury note as in a treasury bond or treasury certificate, we are unable to comprehend. The power to borrow and to pledge the credit of the United States is given. That power Congress can exercise. Nay, it is the duty of Congress to exercise it whenever the interests of

the country require the expenditure of more money than the sources of revenue at command supply. But in what way and manner shall this be done? We answer, in any way, not expressly forbidden in the Constitution, which Congress shall deem necessary and proper to carry the power to borrow into execution and fruition.

The right to borrow—the right to pledge the credit—are undisputed and indisputable. Now, why this mode of doing so should be prohibited, why this form of security should be forbidden, are among the things the objections do not specify. For our part, we cannot see why Congress in its discretion could not select this mode as well as any other. And being within that right of choice, the power is undoubted, whatever any court might think of the policy of its adoption or the wisdom of the choice.

While we are satisfied that the power to pass the act in question can be safely rested on either of the grants we have named, that is, to lay and collect taxes, &c., or to borrow money on the credit of the United States, we are equally sure that, as incident to the power of regulating commerce, or as a means of giving efficiency and effect to that grant, even if neither of the others existed, the authority might be upheld and sustained.

We can deduce the power equally from those express grants to declare war, to raise and support armies, to provide and maintain a navy, to suppress insurrections, and repel invasion. For while we concede that "the language and meaning of the Constitution is not changed by a state of war, by external or internal convulsions, by the temper of the times, or the rise and fall of political parties," as contended for in the argument, yet if it is intended and meant that a state of war, or a great and impending peril or imminent public danger, may or does not, in any case, authorize acts and measures for the public defence and safety which in a time of peace and security would not have been necessary and proper, we cannot give it our assent. On the contrary, we maintain that a state of war authorizes Congress to pass any law, adopt any measure, and devise any means, not actually forbidden by the Constitution, which will make the war effective and give success to the national cause.

We are equally confident that it is comprised in that great general summary of powers conferred in that clause which gives to Congress authority "to make all laws which shall be necessary and proper for carrying into execution the foregoing

powers, and all other powers vested by the Constitution in the government of the United States, or any department or officer thereof." If the power in question can and may be used as a means to give effect to specific powers, and is not forbidden, it is then as clearly and as expressly conferred as any other in the instrument. For though not specific, it is, nevertheless, express. The choice of means, the right of selection and discrimination, are as clearly express grants as are those to borrow money, or to raise and support armies. Therefore, Congress, when it adopts and devises measures necessary and proper to enable it to lay and collect taxes, to borrow money, to raise and support armies, or execute any other specific grant, is acting as strictly within the limits of the power actually conferred by the Constitution, as they are in passing a law to establish a uniform rule of naturalization.

But it is not our design to attempt anything more than to cite a few of the high authorities by which this view of the case is sustained. These authorities, however, are so clear, full and decisive, as to exhaust alike the argument and the illustration. Mr. Justice Story, in his Commentaries on the Constitution, vol. 1, § 433, says: "In the interpretation of the Constitution there is no solid objection to implied powers. Had the faculties of man been competent to the framing of a system of government which would leave nothing to implication, it cannot be doubted that the effort would have been made by the framers of our Constitution. The fact, however, is otherwise. There is not in the whole of that admirable instrument a grant of powers which does not draw after it others not expressed, but vital to their exercise: not substantive and independent, indeed, but auxiliary and subordinate. There is no phrase in it which, like the articles of confederation, excludes incidental powers, and which requires that everything granted shall be expressly and minutely described."

In *Anderson* v. *Dunn*, 6 Wheat. 225, 226, Mr. Justice Johnson, in delivering the opinion of the Supreme Court of the United States, says: "The idea is utopian that government can exist without leaving discretion somewhere. Public security against the abuse of such discretion must rest on responsibility and stated appeals to public approbation." So in 2 Cranch, 358, *The United States* v. *Fisher*, the court upheld an Act of Congress giving a preference to a debt due the United States from an insolvent over other creditor. In delivering the judgment of the court, Mr. Chief Justice Marshall says: "In the case at bar, the preference claimed by the United States is

not prohibited, but it has been truly said that under a Constitution conferring specific powers the power contended for must be granted, or it cannot be exercised. It is claimed under the authority to make all laws which shall be necessary and proper to carry into execution the powers vested by the Constitution in the government of the United States, or in any department or officer thereof. In construing this clause, it would be incorrect, and would produce endless difficulties, if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to some specific power. Where various systems might be adopted for that purpose, it might be said with respect to each that it was not necessary, because the end might be obtained by other means. *Congress must possess the choice of means*, and must be empowered to use any means which are, in fact, conducive to the exercise of a power granted by the Constitution. The government is to pay the debt of the Union, and must be authorized to use the means which appear to itself most eligible to effect that object-"—*Ibid.* p. 396; 1 *Curtis*, 506.

In the great case of *McCullough* v. *The State of Maryland*, 4 Wheat. 311, in which the power of Congress to incorporate the Bank of the United States was contested, Chief Justice Marshall says: "Although among the enumerated powers of government we do not find the word 'bank' or 'incorporation,' we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war, and to raise and support armies and navies. The sword and the purse—all the external relations, and no inconsiderable portion of the industry of the nation, are intrusted to its government. It can never be pretended that these vast powers draw after them others of inferior importance merely because they are inferior—such an idea can never be advanced; but it may with great reason be contended that a government intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depend, must also be intrusted with ample means for their execution. The power being given, it is for the interest of the nation to facilitate its execution."—Pages 407, 408.

In *Martin* v. *Hunter*, 1 Wheat. 304, Mr. Justice Story says: "The Constitution, like any other grant, is to have a reasonable construction according to the import of its terms; and when a power is expressly given in general terms, it is not to be restrained to particular cases, unless that construction

grows out of the context expressly, or by necessary implication."

We can add nothing to the force and cogency of the reasoning in these cases; they exhaust the whole argument. Every line and syllable of them which sustains the right of Congress to choose and adopt such means as may conduce to the execution of a given and admitted power are as applicable to the case in hand as they were appropriate to the causes in which they were uttered; and with the great case of *McCulloch* v. *Maryland*, standing for near half a century not only unreversed but unshaken, as the highest judicial interpretation that can be given to the Constitution, the question is not doubtful. In our judgment, that case goes further than is required to sustain the power claimed here. In that case the power to create or incorporate a bank, and to confer upon it the power to issue notes and circulate them as money, was placed upon irrefragable grounds. Now, if Congress possessed this power, why may not the government do the same thing through and by its constitutional agents and officers? If it can be done through this intermediate agency, why not directly by the government itself? The power to do the thing must all come from the same source. If Congress has not the power, they cannot confer it upon any one. If they have it, they may execute it in any manner or through any means not forbidden in the Constitution which they may deem necessary and proper for the purpose.

With the power to issue the notes established, the right to make them a legal tender follows as a matter of course. The objection and argument go to the whole power; if they fail as to the one, they necessarily fail as to the other also. If the interdiction to the States against any emission of bills of credit does not apply to Congress, neither does the other part against making anything but gold and silver coin a legal tender in payment of debts. If Congress has the power to issue these treasury notes to be circulated as money, there can be no doubt of their right to regulate their value in the exchanges of trade and the payment of debts. As we have already seen, Congress has, from the earliest period since the adoption of the Constitution, controlled and regulated the subject of legal tender. Foreign coin has in some instances been made such, and again been repealed. For fifty years treasury notes have from time to time been made a legal tender in payment of all dues to the United States—a right never seriously controverted, and fully sustained by one of the most eminent jurists of the country.

If Congress deemed it necessary and proper to impress this quality upon these issues, in order to give them greater credit and currency with the public—in order to enable the government to lay and collect its taxes, to borrow money, to pay the debts of the Union, to raise and support its armies, to provide and maintain its navy, to suppress a formidable and gigantic insurrection, to provide for the common defence and general welfare—he would be a bold jurist that, in view of the authorities we have cited, would undertake to either doubt or deny the authority of Congress in the premises. We have no hesitation in declaring, as our opinion, that the powers of Congress are ample, and fully sustain this legislation in all its parts.

This whole question was recently before the court of appeals of the State of New York, in the cases of *The Metropolitan Bank and the Shoe and Leather Bank* v. *Henry H. Vandyck*, and *Lewis H. Meyer* v. *James J. Roosevelt*. The majority of the court sustained the power of Congress to the fullest extent. The leading opinion, delivered by Judge Davies, is an able and exhaustive exposition of the whole question, and reflects much credit upon its author, as well as on the high court of which he is an honored magistrate.

We have given to this subject the most careful and deliberate examination and consideration of which we are capable. We have fully pondered and weighed the able and ingenious argument of the senior counsel of the claimants on this branch of the case, and have arrived at the conclusion that the act is clearly within the powers of Congress, and that it does not in any of its parts conflict with the Constitution of the United States.

The Constitution was ordained and established by the people of the United States in their sovereign capacity as a people. They intended through and by it to found a system of government, with all the powers necessary to regulate and control all matters of a general and national character. Though limited in its powers, it is sovereign and supreme within their scope. It possesses every attribute, power, and function necessary to maintain its authority and perpetuate its existence. And, though true that the vicissitudes of peace and war, of security and danger, do not change the powers of the government or the grants of the Constitution, yet, for every crisis that may come, for each emergency that may happen by human agency, or in the ordinary line of Providence, it has made ample provision. It was well characterized in the argument of the learned solicitor as "the miracle of the eighteenth century."

It is apparently, at least, as exhaustless and unfailing in its capabilities and powers, and their complete and perfect adaptation to every time, occasion, and circumstance, as was the miraculous supply of meal in the barrel, and oil in the cruse of the widow of Zarephath. And while to the strict, technical constructionist it may present a bleak and barren aspect, yet under the benign interpretation of our Supreme Court, guided by the incomparable mind and genius of Marshall, like the rock in the wilderness when smitten by the prophet's rod, it sends forth its pure, ample streams to benefit and bless the nation.

II. The claim made for payment in coin, or its equivalent, is rested on the clauses in the contracts for building the Buffalo and Oswego custom-houses, which stipulated that the payment should be in "good and lawful moneys of the coin of the United States." A reference to the briefs and opinions in this case, when it was originally before this court on the question of damages, will show that the main contest then was, whether there had been such an entire and total abandonment of the contracts as would justify the court in putting them out of view altogether, and allow the plaintiffs to recover for the whole work, as on a *quantum meruit;* or whether the contracts were to govern, so far as they could be traced, and so far as the work was done under them, and the claimants be allowed only to recover the value of the work outside the contract, and the cost and expenses of any changes made. A majority of the court ruled the cause distinctly on the latter ground. All the work which had been done under the contracts had been paid for. Nor was the suit founded on them. They were given in evidence only as inducement to the action, and not as the ground of recovery. The suits were founded upon verbal and implied contracts growing out of the orders and directions of the Secretary of the Treasury and the agents of the United States in charge of the work. The work, therefore, being outside of the contracts, none of their special provisions and stipulations were applicable to the case.

But, in any event, the debt or claim, whatever it was, merged in the report or judgment, the amount of which the claimants were entitled to receive in whatever was lawful money and legal tender at the time it fell due and payable. The report of the damages in this court was made on the 5th of May, 1862, after the passage of the act authorizing treasury notes, and a payment in that currency would, we think, have discharged the debt. 6 Allen Mass. 516; 3 Conn. 58.

But what makes the case still stronger against the claimants,

in our opinion, is, that being dissatisfied with our views and the principles upon which we assessed and by which we measured the damages, they induced Congress to reverse our finding and assess their damages on a *quantum meruit*. This gave them more than double the amount they were entitled to under the rule of damages fixed by the court. But it also put the contracts entirely out of the case. The allowance by Congress had no reference to these contracts whatever, and was based upon the assumption that they had been entirely abandoned and repudiated by the parties. This being so, and having been adopted at their own instance, they cannot now set them up as still ruling and governing the case. They cannot repudiate them for one purpose and affirm them for another. Having received their allowance from Congress on the allegation that the contracts were defunct, they cannot now exhume them in order to claim a benefit under them.

It is, therefore, unnecessary for us to decide what would be the effect of contracts to pay in coin, or how and as to what extent they would be affected by the intervening Act of Congress making treasury notes a legal tender. The case is not within the contracts, and the point, therefore, does not and cannot arise.

III. But the claimants contend that the act for their relief, passed on the 3d of March, 1863, makes the amount payable out of the unexpended appropriation made in 1857 for the completion of the Buffalo and Oswego custom-houses. The argument is, that the only lawful money at that time was gold and silver coin; and it having been then appropriated by law, they are entitled to the identical money set apart for them by this appropriation; and that the latter appropriation is in the nature of an order or draft on the fund, operating as an equitable assignment of it to them. This position and argument is predicated, we think, on a misapprehension of the nature and effect of a legislative appropriation of money for any designated purpose, as well as of the usages of the Treasury Department upon the same subject.

An appropriation does not separate the amount of money named in it, and set it apart from the balance of the government funds, so as to keep the identical money for the specific purpose for which the appropriation was made. Appropriations are sometimes made of vast sums when there is but a small sum in the treasury. It would be almost impossible to find money enough of any kind to carry out this idea of the claimants. For, if all the outstanding and unexpended appro-

propriations had to be hoarded and kept separate and distinct from all other public money, it would require vast sums, and be alike injurious and inconvenient to the government and the people.

The only effect of an appropriation by Congress is to make it lawful for the officer charged with the business to which it relates to apply so much of any money as may be in the treasury at the time to that specific object. It is not the identical money, but the specific sum, that is appropriated in such cases. And by the very terms of the law under which it is claimed, it was payable out of "*any money* in the treasury not otherwise appropriated." Nor was it payable until it was due and demandable, and that was not until after the 3d March, 1863. The only money in the treasury then, so far as we know, applicable to this claim, were treasury notes. These were lawful money, and in these the debt was paid. This was a good payment, both in kind and amount, and the claimants have no legal or equitable claim on the United States for anything more.

We therefore find in favor of the defendants, and direct judgment to be entered accordingly,

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Supreme Judicial Court of Maine.—Sagadahoc County.

ALFRED LEMONT *et al.* v. IVORY LORD *et al.*

1. The master of a ship is primarily the agent and representative of the owners of the ship. If his voyage is prosperous and free from disaster, he has no right to intermeddle with the cargo on the voyage, or on its safe termination.

2. But, in his character of master, he has originally a latent potentiality of other powers and agencies which subsequent events may call into exercise in case of disaster, peril, or stress of weather. He may be called on to act from necessity, and, in the absence of all other parties, as the agent of each and all persons interested in the vessel, in the cargo, in the freight and in the insurance.

3. When a vessel is lost by the perils of the seas, or puts into a port in distress and is condemned as unseaworthy, the ship-owner is not bound *by the terms of the charter party*, which excepts "the perils of the sea," to forward the goods saved.

4. But the ship-owner, or the master as his agent, *may* retain possession and forward the goods in another vessel, and it is the duty of the master so to do if thereby anything can be saved as freight to the owners of the ship.

5. But, if this cannot be secured, the master cannot bind his owners to pay

to the owners of the new ship a freight greater than the original freight of the whole voyage

6. The master may act as agent or supercargo, and it is his duty so to do when he can send the cargo forward at a rate of freight which, under the circumstances, reasonably promises to be for the interest of the owner of the goods. In so doing he acts as agent of the shippers, and not of the owners of the ship.

7. When a ship was condemned at an intermediate port, and the master, in his own name as master, shipped the cargo on board of another vessel, to be carried to the port originally designated, at a rate of freight higher than the freight for the whole voyage, it was

Held, that the owners of the second ship could not recover of the owners of the first ship the freight thus stipulated, either on the bill of lading or on an implied assumpsit.

KENT J.—The plaintiffs claim to recover of the defendants, in an action of assumpsit on an account annexed, and with the common money counts, for the carriage of coals from the Mauritius to Rangoon.

The case comes before us on an agreed statement of facts. The plaintiffs are the owners of the barque "Alfred Lemont." The defendants were the owners of the ship "Waban,"—both American vessels. The "Waban," having on board a cargo of coals, which had been laden in pursuance of the terms of a charter party entered into at London, sailed on her voyage from Cardiff to Rangoon, where the coal was to be delivered to consignees named, at a freight of £2 per ton.

On the voyage the ship met with disasters by the perils of the sea, and was so much injured before putting into "Port Louis" or the "Mauritius," as to be wholly disabled from resuming and completing the voyage to Rangoon; and, upon survey, she was condemned. A part of the cargo had been jettisoned at sea, a part sold by the master at "Port Louis" for payment of his expenses, and the remainder, about 850 tons, had been put on shore. In this state of affairs the plaintiffs' barque, the "Lemont," arrived at the same port, and the master of the "Waban" stated to the master of the "Lemont" what the condition of his vessel was, and that he had discharged his cargo, and that perhaps he should want the "Lemont" to carry the coal to Rangoon, to which the master of the "Lemont" replied, expressing his readiness to take it if terms could be agreed upon.

Two days afterward, after public notice calling for proposals, the master of the "Lemont" put in proposals, and his offer, being the lowest, was accepted. The rate of freight agreed upon was £2 5*s*., being five shillings per ton more than the rate on the original shipment for the whole voyage. The coal was

taken on board, and a bill of lading signed by the master, which states that there had been "shipped in good order, and well conditioned, by S. A. Hartridge, master of ship 'Waban,' in and upon the 'Alfred Lemont,' 850 tons of coal, to be delivered (perils of the sea excepted) to the same consignees named in the original charter party and bill of lading given by the 'Waban' at same port of Rangoon. Freight for said goods to be paid in cash on right delivery of the cargo, two pounds five shillings." The "Lemont" arrived safely at Rangoon. The consignees refused to receive the coal. Thereupon the master of the "Lemont," after proper proceedings, caused the coal to be sold at auction. The proceeds of the sale were not sufficient to pay the stipulated freight of two pounds five shillings.

This action is brought by the owners of the "Lemont" against the owners of the first ship, the "Waban," to recover the balance of the freight, for carrying the coals from Port Louis to Rangoon.

The plaintiffs claim to maintain this action on the ground that the defendants were the shippers of the goods on board the "Lemont." There is nothing in the language of the bill of lading signed by the master of the "Lemont" which declares in terms by whom the freight was to be paid. It does not contain the condition usually found in such bills of lading after the designation of the consignees, "he or they paying freight for the same." But it has been determined that the shipper named in a bill of lading is liable primarily for the freight, although he does not own the goods, and although there is no express stipulation on the part of the shipper to pay freight. His liability results from having engaged the ship-owner to take on board and carry the goods at his instance. *Blanchard* v. *Page*, 8 Gray, 290; *Worster* v. *Torr*, 8 Allen, 270. If, therefore, the defendants were the actual shippers by themselves or their legally authorized agent, they may be held to pay the stipulated freight.

Were they such shippers? The goods as declared in the bill of lading were shipped by Hartridge, master of the "Waban." The contract was clearly made by him. The case finds that Hartridge "acquainted the master of the 'Lemont' with the condition of his vessel," and that he had landed his cargo. The master of the "Lemont" then knew that he was acting with the master of a vessel which had in effect perished by the perils of the sea, and could not be repaired. There is no evidence beyond these facts, that the master con-

tracted for the carriage of these goods in the name or on behalf of the owners of the ship. Nothing appears to have been said or understood between the two masters as to the capacity in which he acted, whether as agent for the owners of the cargo or of the ship. He put the coals on board at a freight stipulated. The plaintiffs contend that the law fixes the liability of the defendants from the fact that the master of their disabled vessel thus placed the goods on board, and that he must be held as rightfully representing them in the transaction as their agent.

What, then, are the rights, duties and obligations of the owners of a vessel, which has, by the perils of the sea, become totally disabled from resuming and completing the original voyage, as to the transhipment and forwarding of the cargo to the port of destination?

It is not contended that the "Waban" could have been repaired within a reasonable time, or at a reasonable expense; she was a vessel lost by the perils of the sea.

The first question is whether the law requires that the owners of the vessel, *by virtue of the charter-party or bill of lading*, should, under all circumstances, forward the cargo in such case, as part of their original undertaking. This clearly is not according to the terms of the charter-party, nor does it result from the nature of such maritime contract. The agreement is to take on board the vessel named the goods, and to carry and deliver the same at the port of discharge; "the perils, dangers and accidents of the seas, rivers, and navigation during the voyage always mutually excepted." The perils of the seas did in this case prevent the prosecution of the voyage. Emerigon, ch. 12, § 16, says: "The peril of the sea is present whenever the vessel has been placed out of a state fit for navigation, whether by tempest or stranding." The right to abandon as for a total loss exists when the ship, for all useful purposes of the voyage, is gone from the control of the owner. Kent C. iii. 321; *Peele* v. *Ins. Co.*, 3 Mason, 27. The ship-owner is absolved from his contract to carry, if prevented by the perils of the seas. *Benson* v. *Duncan*, 3 Ex. Rep. (Welsby & Hurlstone) 655; Kent Com. iii. 216. It follows that if sued for non-delivery under the contract of affreightment, he may reply that he was prevented from so doing by the perils of the sea, which were expressly provided for, and in terms made a sufficient excuse for non-performance. We then have the case where there is no legal obligation *under the contract* on the part

of the ship-owners to tranship and carry forward the goods to fulfil their obligation.

But is the cargo to be abandoned and left to perish without any care or attempt to forward it to the port originally designated by the parties? Does no duty devolve upon the ship-owner or the master? If both the ship-owner and the owner of the cargo, or the authorized agents of each, should happen to be at the port of disaster in a case like this, could the owner of the cargo require, as matter of right and duty, that the ship-owner should obtain and employ another ship at a higher rate of freight than that agreed upon for the entire voyage? All the writers and authorities agree that no such claim could be sustained, because the original contract being ended, and both parties being present to look after their rights and property, there was no unlooked for emergency which forced upon any person or party from necessity a care or agency in respect to the goods. Emerigon so states the rule, ch. 12, § 16.

The case at bar, however, is one where neither party is present, and the master of the ship is the only person who is in a position to look after the interests of all parties concerned. What are his duties and powers, and whom can he, or does he bind by his acts or contracts? His ship is lost, but the cargo remains, discharged from the ship, and in a state fit for re-shipment. This condition of things, of course, has not been uncommon since the days of the earliest navigators, and it has called the attention of the earliest writers on the law of the seas. Emerigon says that in such a case it is not doubtful that the captain, who is not less the agent of the shippers than of the owners, must watch over the preservation of the merchandise, and do all that circumstances require for the best.

The Roman law decided that the captain was released from his engagements if by accident, and without his fault, the vessel becomes unnavigable during the voyage. Faber and Vinnius on this law say that in such case the captain is not bound to seek another vessel.

The "*Ingemess d'Oleron*," speaking of the vessel placed out of a state fit to continue the voyage, determines that the master *may* hire another vessel to finish the voyage, and shall have his freight on the wares saved. The ordinance of Wisbuy also says that the master may hire another vessel. The French have an "ordinance" on this subject which seems to make it the duty of the master to obtain another ship, although both Valin and Pothen differ from Emerigon in his construction of it. They insist that the master is only bound to hire another

ship if he wishes to earn the whole of his freight. The English authorities seem to leave the question as yet undecided, whether it is the right or the duty of the master to re-ship. The American law is now understood to be that stated by Chancellor Kent in his Commentaries.

"In this country we have followed the doctrine of Emerigon and the spirit of the English cases, and hold it to be the duty of the master *from his character of agent of the owner of the cargo*, which is cast upon him from the necessity of the case, to act in the port of necessity *for the best interest* of all concerned; and he has powers and discretion adequate to the trust, and requisite for the safe delivery of the cargo at the port of destination. If there be another vessel in the same or in a contiguous port, which can be had, the duty is clear and imperative upon the master to hire it, but still he is to exercise a sound discretion adapted to the case."—Kent C. iii. 212.

Now in the case before us the master did deem it proper to send on a portion of the cargo of the "Waban." He found a vessel, the master of which agreed to carry it to Rangoon for forty-five shillings per ton, as stated before. He decided that the interest which he represented required or justified such transhipment. We see nothing in the case which leads us to doubt that the master acted in good faith, and that, under all the circumstances, it was a reasonable exercise of his powers. But the question behind all this is, Did he by the act bind the owners of the ship to pay the whole freight, and can this action be sustained against them on an implied promise arising from the acts of the master? or, as before stated, Were they the shippers of the coal on board the "Lemont"?

It is important to distinguish between general and limited agency. The master of a vessel is not an unlimited agent for the owners of the ship. He has, undoubtedly, extensive powers, but he cannot act for, or bind his owners beyond the authority given to him by them or by the law. It is unnecessary to state more definitely the matters in which he is undoubtedly their agent, and in which his acts bind them. It is enough to say that, like all other agents, he cannot act or bind his principals beyond the scope of his authority. It does not follow that every contract he may make, even about the ship, is from that fact alone binding. In every case, then, where it is attempted to charge the owners in a contract made by the master, they have a right to require the proof of such facts as show that he had acted within the limits of his authority. Nor does it follow that the owners will be held because the master

acted in good faith, nor because the party dealing with him believed and acted on the belief that the master had power to bind his owners. The whole matter, as in other cases of agency, must be brought to the test of the law, and the owners will only be held when the case is brought within the limits of the master's power to bind them.—*Pope* v. *Nickerson*, 3 Story, 405. There is nothing mystical or unusual in this matter of a master's agency. His general authority to bind the owners of the ship by his contracts is derived from his general and ordinary character of master; and in that character he can only bind the owners by contracts relative to the usual employment of the ship, and the means requisite for that employment. The master, as to the *cargo*, is limited to the duties and authority of safe custody and conveyance only, and, except in cases of unforeseen necessity, he is a stranger to the cargo beyond these purposes. — *Millword* v. *Hallet*, 2 Caines, 82; Story on Agency, § 118.

The owner can only be affected by contracts relative to the master's trust, who is set over the ship and not the cargo; and the owner of the ship cannot be bound by any contract of the master concerning the purchase of goods or charges attending them. "It would be of most dangerous consequences," says Chancellor Kent, in the case above cited, "to ship-owners, to be held responsible for all the master's contracts and loans relative to the goods on board; and it would be unjust in principle, because such contracts are not within the purview of the master's trust." But still, as we have seen, the master may be and is bound in certain contingencies to assume authority over the cargo, and to act efficiently in causing it to be forwarded. How does he acquire that authority, and from what source is it derived? May not a solution of the question, and a reconcilement of some apparent contradictions in the authorities, and in the doctrines of the writers on maritime law, be found in the true character of the master, and his relations to all parties interested in ship and cargo?

When a master stands on the deck of his ship as he sails out of the port of departure, he is primarily, and as he there stands, the representative and agent of the owners of the ship. If his voyage is prosperous and free from disaster, he has no right, as we have seen, to intermeddle with the cargo on the voyage, or on its safe termination. But he has, so to speak, within himself a latent potentiality, existing in possibility and not in act, of other and distinct powers and agencies, which subsequent events may call into exercise. From a simple cap-

tain of the ship, and of that alone, he may, in case of disaster, peril, or stress of weather, become an absolute master over the cargo. He may cast it overboard, if the safety of the vessel requires the sacrifice; he may, in case of absolute necessity, sell a part of the cargo; he may, when not forbidden by a positive statute of his country, ransom both ship and cargo; he may be, as he often is, placed in such circumstances that he is from necessity, chiefly by reason of the absence of all other parties, the agent of each and all persons interested in the vessel, the cargo, the freight, and the insurance. Now does the law contemplate that when these latent potentialities are brought into action, and the master is forced to assume not *new* powers suddenly cast or thrown upon him, but the powers which inhered in him from the first, undeveloped and in abeyance, that the ship-owner is necessarily bound by all his contracts, acts, or assumptions of a pecuniary nature, however onerous to him, and although he can never derive any benefit therefrom, and which yet may be of vital importance to the other party for whose use the contract was made?

The master may be, by *appointment* of the owners of the cargo, the agent, or supercargo, or factor for such owner. His duties and liabilities under his two characters are as distinct and independent as they would be if the trusts were confided to different persons.—*The Waldo*, Davies' R. 161 (Ware D. J.); *Williams* v. *Nichols*, 13 Wend. 358. In *Shipton* v. *Thornton*, 9 Ad. & Ellis, 314, Lord Denman, speaking of a case of a transhipment at a higher rate than the original freight, says: "Another principle will be introduced, that of agency for the merchant." Chancellor Kent says, "The character of agent and supercargo of the owner of the cargo is forced upon the master; and he must, in case of emergency, exercise the discretion of an authorized agent."—*Searle* v. *Scovell*, 4 I. C. R. 224. In the leading case of *The Gratitudine*, 3 C. Robinson Adm. 240, Lord Stowell says, "The authority of agent is necessarily devolved upon him;" "the character of agent and supercargo is forced upon him;" and, in another place, "the character of agent respecting the cargo is thrown upon the master."

We are inclined to agree with the learned counsel for the plaintiff that the expressions denoting that the agency or powers of a supercargo are "forced," "cast," "thrown," "devolved," mean only that the exigency requires him to bring into action the latent powers inherent in him in his original character of master for the voyage. But, however the agency originates,

it is an agency in fact, with the powers, rights, and duties of a supercargo. If so, does the cause or mode of appointment affect or vary the actual powers?

When the master becomes the supercargo, does it make any difference whether he was originally designated by the owner before the voyage commenced, or whether he became such by necessity and force of circumstances? In either case he is an agent for the merchant. If, in the case at bar, Hartridge, the master, had been appointed supercargo by the owners of the cargo before he sailed from Cardiff, and he had made this shipment under the circumstances as detailed, and without any more definite designation of the party to pay the freight, could the ship-owners have been held on an implied promise to pay it? Would not the law hold that he must have acted for the owners of the cargo for which he was supercargo? Does not the same result follow if he was such agent or supercargo by force of circumstances? Were his powers to bind those he represented less, because those powers were brought into exercise by reason of the disaster to the vessel? The essential question is, What powers did he actually possess, and for whom had he a right to act in this shipment on the "Lemont"? Instead of a prosperous voyage, the master of the "Waban" found himself at Port Louis, his ship totally disabled, and, in legal contemplation, lost. A portion of his cargo he sold to defray his expenses. This was his first act of authority in reference to the disposition of the cargo. In that sale he necessarily acted as agent for the owners in selling and transferring the title to the goods. The title remained in the owners, notwithstanding the disaster. Only an authorized agent could transfer the title in their absence.

The remainder of the cargo was on shore. What was the master's duty in reference to it? There were two absent parties, both of whom he represented, who were or might be interested in the disposition of the cargo. The original object of both these parties was the same; viz., that the coal should be transported to Rangoon. The ship-owner desired this that he might secure his freight; the merchant that he might have his coal when it was required for immediate use. The sum of all the authorities seems to be, that the master "is bound in duty to do the best for all concerned"; or, in more colloquial language, to do the best he can.—*Plantamour* v. *Staples*, Douglass, 219.

Assuming that the American law imposed upon him the right and the duty both to cause the cargo to be carried forward, if

it could be done *reasonably*, the master in this case did do it in the manner before stated. For whom did he do it? Who is responsible pecuniarily for his contract? When a master finds himself in this position of responsibility, and called upon to act, he is to remember that the owners of his ship will lose all their freight if the goods are not forwarded; and that he on their behalf, as master, has a right to retain possession for the purpose of transhipping, in order to earn the original freight, or in part at least.—*Mason* v. *Lickbarrow*, 1 H. B. 359. If this can be done, it answers all the purposes of the original contract, so far as the principal object of the voyage is concerned. If, then, the master can find in the port, or in one within a reasonable distance, another ship, the master of which will agree to carry on the cargo at a rate at which something may be saved to the owners of the ship out of both freights, it would be his right and his duty to employ the new ship for the benefit of his owners, and acting on their behalf. For although there is no legal obligation under the original contract, yet the owners of the vessel may, if they find it for their interest, forward the cargo in another vessel. It is, therefore, the right and duty of the master to make all reasonable efforts to obtain another vessel on such terms as will eventually save something to the owners of the ship.—*Flagg* v. *Augusta Ins. Co.*, 7 Howard, 595.

In doing this, he acts as master of the vessel, still having in his possession the cargo for the owners of the ship, and has not any occasion, nor is there any necessity for his assuming the character of supercargo or agent for the merchant. This latent and dormant office still remains in abeyance.—1 Parsons' C. Law, 158; *McGow* v. *Ocean Ins. Co.*, 23 Pick. 405. But if he cannot find any such vessel which will take the goods for any sum less than the original freight, is the master at once to abandon the cargo without further effort? Would that be reasonable or right? Although the ship-owner may have no duty or interest touching the cargo, its owners may have great interest in having it transported to the port of destination, even at an enhanced price. In such a condition of affairs, the office of a supercargo comes into action, and it becomes the duty of the master to act for the interest of his principals, and to determine whether it is reasonable to believe that their interests would be subserved by transhipment. He is to do what a judicious and honest supercargo would do in the same circumstances. If he acts in good faith, great latitude will be extended to him, and mere error of opinion and judgment, if there was

reasonable ground for his decision, will not render his acts void, or make him responsible. It follows that there may be cases when it is plain that the act of the master, or as supercargo in employing another vessel was so unreasonable and so manifestly against the interest of the party he represented, that no one but himself should be bound thereby. The counsel for the plaintiffs, in his able argument, admits that "the duty in question is not to employ another vessel at all events, but if it is reasonable to do so." He, however, maintains that of this reasonableness the master is the judge, and his judgment is final, so far as a third party is concerned. If this be so, then the qualification that the master must act *reasonably* is inoperative. If he is required to act reasonably, and yet he is to determine absolutely what is reasonable, it amounts only to saying that whatever the master determines to do is reasonable. It leaves the master with absolute power to bind his owners. But the counsel further contends, that although it may be true that as between themselves the master is agent for all concerned, yet that in his dealings with others he is to be regarded only in his capacity of master of the ship, and servant of the ship-owner. He urges that the ship-owner is always known or may easily be found, while the owner of the cargo may not be known; that the new parties with whom he contracts for relief are not to be involved in these questions of relative interests. In short, that the new party has a right to regard the ship-master as acting in all these matters as the authorized agent of the owners of the ship, and that he is not bound to ascertain any of the facts. There is, it must be confessed, at first view, some plausibility in this position. But it claims too much. Why is not the master of the new ship bound to know or ascertain with whom he is dealing, as in other cases of agency? It will not do to say that the ship-owners are bound by *every* contract of the master made with a third party. We have seen that the master's power to bind is limited to certain well-defined cases. Suppose that a master at an intermediate port should engage another vessel to take on a part of his cargo,—his own vessel being uninjured,—but he, desiring to make more room for his own personal accommodation, determines to tranship a part of his cargo, although there is no necessity in the case; would his owners be bound to pay the freight? Clearly not; and why not? Because the master had no right thus to defraud his owners. The master would be bound, doubtless, as he is in all cases of contracts made by himself. There are many like cases where the owners are not bound by the mas-

ter's contracts, although made in their name. This case finds, in the agreed statement of facts, that the master of the "Lemont" knew that the party seeking the use of his vessel was or had been the master of a disabled and lost ship, and that his cargo had been landed. He knew, then, that he had been acting with an agent. If he desired to know more of the condition of affairs, and the relation of the master to ship and cargo, and for whom he could legally act, he could have inquired, as he probably did. If not, he doubtless relied upon his lien on the goods as ample security, as it commonly is. If, as in this case, that lien proves insufficient, the party can recover only of the person that was the shipper himself, or by an authorized agent. The question then returns as to the agency, in fact and in law.

It is at first view rather singular that no case can be found where the precise question before us has been determined in an action by the second ship to recover of any party for the freight on the ground of personal obligation. The reason of this undoubtedly is, that in most of the cases the lien on the goods has been sufficient to protect the ship-owners, and to compel the consignees, or some party, to pay the stipulated freight in order to obtain possession of the goods. The legal principles which lay at the foundation of the action, and upon which it must stand or fall, have been more or less distinctly discussed or alluded to by various authors, and in different cases. Several of these have been already referred to in this opinion. Chancellor Kent says that we have followed the doctrines of Emerigon, and he is undoubtedly of the highest authority in all questions of maritime law. What does he say as to agency of the master? He declares that "the quality of *captain* makes him *master*" (that is, as we understand him, master of the situation in all its aspects and demands). He adds, "and attributes to him the care of all that concerns the vessel and cargo. He is bound to do what it is to be supposed the shippers would do if they were present."—ch. xii. § 16. The same author, in commenting on and condemning a decision under the French "ordinance," states the argument of the master of the ship as follows, in substance: That the voyage had been determined by the loss of the vessel; still, he was bound to neglect nothing for the preservation of the goods; that he had been obliged to hire other vessels to bring them to their destination. Why should the captain, who preserves the goods, and brings them to their place of destination, be ruined by the additional freight of the substituted vessel? *The captain is obliged to hire another*

vessel only in his quality of factor. He is, therefore, to have the choice either of claiming his freight in entirety,—in which case the freight of the substituted vessel is at his (owner's) charge,—or of reducing his freight in proportion to the voyage accomplished; in which case the freight of the substituted vessel is at the charge of the goods saved. Emerigon adds after this statement, "these reasons were at once forcible and legal."

Shipton v. *Thornton*, 9 Ad. & Ellis, 314, is the only English authority in which we find a distinct reference to a case where the voyage cannot be completed except at a rate of freight from the port of necessity higher than the original rate. Lord Denman in that case says, "It may well be that the master's right to re-ship may be limited to those cases in which the voyage may be completed on its original terms as to freight, so as to occasion no further charge to the shippers, and that when the freight cannot be procured at that rate, another but familiar principle will be introduced, *that of agency for the merchant*. For it must never be forgotten that the master acts in a double capacity as agent of the owner as to the ship and freight, and agent of the merchant as to the goods. These interests may sometimes conflict with each other, and from that circumstance may have arisen the difficulty of defining the master's duty under all circumstances, in any but very general terms." The case now put supposes an inability to complete the contract on the original terms, in another bottom, and therefore the owner's *right* to tranship will be at an end. But still, all the circumstances considered, it may be greatly for the benefit of the freighter that the goods should be forwarded to their destination, even at an increased rate of freight; and if so it will be the duty of the master, *as his agent*, to do so. *In such a case* the freighter will be bound by the act of his agent, and of course be liable for the increased freight." There are several American cases in which the right and duty of the master to re-ship, in case of disaster, are considered; the result of them seems to be what is stated in *Bryant* v. *Conn. Ins. Co.*, 6 Pick. 143. "After all, it becomes a question of *reasonable* care and conduct on the part of the master, and like other questions of that nature, after the facts are found, the law arising from them will be pronounced by the court." All the cases admit that there is no imperative and inexorable duty in every case to tranship even for *the owner of the cargo;* and even if a vessel can be found, the terms may be so onerous as to absorb wholly the value of the goods at the port to which they were destined. The value of the cargo may be nearly or quite as

great at the port of disaster as at that port, or there may be other circumstances which would render transhipment manifestly and indubitably injurious to the interest of all parties. Every case must depend upon its own surrounding circumstances.

The test question is, what was reasonably required of the master or supercargo under a plain and common-sense view of the situation. *Saltus* v. *Ocean Ins. Co.*, 12 John. 107; *Treadwell* v. *Union Ins. Co.*, 6 Cowen, 270. "What is reasonable and just in the execution of his powers in such cases is legal." The case of *Thwing* v. *Washington Ins. Co.*, 10 Gray, 443, is a very recent decision by the Court of Massachusetts, and discusses, with the usual ability and learning of that eminent tribunal, the points involved in the case before us. Although that was not a case against the owners of the first ship to recover freight, yet its consideration involved the principles on which such a claim rests. The court in that case deny the proposition that the master is obliged, in his capacity as agent for the owner of the vessel, in all cases of disaster to the ship, to send forward the cargo, even if it remains in a condition to render its transhipment judicious and expedient; that no such duty or burden is imposed by virtue of the contract of affreightment; that contract is always subject to the proviso that its performance may be defeated and excused by the perils of the sea. The opinion, however, distinctly recognizes the right and duty of the master to act as agent of the owner of the cargo, after he has ceased to have any such right to act for the shipowner. After alluding to the difficulty of drawing the exact line which would distinguish the master's authority to act for the various parties interested, the learned judge (now Chief Justice Bigelow) states the conclusion as follows: "But we think that it may be safely said that whenever and as soon as the owner of a vessel, by reason of the perils of the sea, ceases to have any interests either in the ship or freight, so that nothing of either can be saved or protected by any act of the master, *his authority to bind the owner is at an end.* The subject-matter of the master's agency for the owner of the ship in such a case, ceased to exist, and his power to bind the principal ceases with it." * * *

"In the absence of any adoption or recognition by the owner (of the ship) of such transhipment, we know of no principle or authority on which it can be held absolutely binding on him. On the contrary, the more reasonable doctrine is that stated in 2 Phil. Ins. § 1634.

'If the motives of the master's course are wholly on the side of one party, then he must be presumed to have acted on behalf of such party.' The same general doctrine as to the interests of the party to be affected by a contract by the master, is found in *Duncan* v. *Benson*, Ex. R. 1 Welsby & Hurlstone, p. 557.

"In all other cases, where by no possibility the *shipper* could *derive benefit*, there is no implied authority from him to the master, and the act of sale or pledge would be simply wrongful." Why is not the same rule to be applied to the ship-*owners*, in their relation to the cargo situated as this was. In *The Gratitudine*, 3 Rob. Ad. R. 261, it is declared that "in all cases it is the prospect of benefit to the proprietor that is the foundation of the authority of the master." The case of *Gibbs* v. *Grey* (Ex. R.), 2 Hurlstone & Norman, 21, is one where in a case of disaster like the present, the master made the contract of re-shipment in direct terms for the owners of the cargo, and as their agent. Although in that case the court denied his power to bind them, yet it was upon the ground that the owners of the cargo had an agent at the port of re-shipment who was not consulted, and on the further ground that the contract was *unreasonable*, as it provided for the payment of dead freight; but the power so to bind the owners of the cargo in a proper case was not doubted. It is urged that the owners of the ship appoint the master, and therefore they must be held responsible for his contracts. It is true that they do make the appointment, but they do not thereby themselves create or limit all his powers and duties. The law fixes them in almost every respect. The shipper knows, or may know, who he is, and what his character and reputation is or has been; he knows, or is held to know, the law applicable to him. He knows that he may in certain contingencies be called upon to act in reference to the cargo as his agent or supercargo; he knows that when those contingencies arise, that he may no longer be agent for the ship-owner who appointed him, but for himself. It does not, therefore, necessarily follow that when the owners employ the master, they confer on him any powers relating to the cargo as their employee; the law steps in, and defines and confers the powers in question on the office he holds.

We are not called upon in this case to consider any question arising between the ship-owners and the original shippers; nor are we called upon to consider the question how far, as between the ship-owner and the charterer, the former may be liable for

the wrong-doings or non-feasances of the master; none such are intimated in the case before us. Our question relates entirely to the validity of a contract, and its binding obligations on the ship-owners made with a new and third party. In this case we are not called upon to determine whether, by this shipment of the coals, the master bound the owners of the cargo by a reasonable exercise of his powers in their behalf. As we have seen, there may be cases where he binds no one but himself. The precise question before us is whether the ship-owners are liable as on implied promise to pay the stipulated freight in the second ship on the facts stated; if they are, then the owners of the ship are to be holden liable, as shippers of the cargo, for the freight of goods in which they never had any ownership or title, and from the further carriage of which under their contract they have been absolutely absolved, and from the transportation of which in the new ship, as it is admitted, they cannot derive any benefit or save any part of the original freight, and where they are not named or recognized as such shippers in the bill of lading, or by the master in his negotiations, and where no subsequent ratification is pretended.

We do not think that under the circumstances as they existed, it would have been a reasonable exercise of the master's powers if he had attempted to bind the owners of his ship by a distinct promise in their behalf to pay the new freight; and it would be certainly as unreasonable in the court to hold them liable on an implied promise, and as the actual shippers of the coal, in the absence of any evidence of an attempted agency or direct promise on the part of the master.

Plaintiffs nonsuit.

P. Barnes, for plaintiff; *J. Dane*, and *T. M. Hayes*, for defendant.

Supreme Court of Connecticut.

Charles Booth and Others *v.* The Town of Woodbury.

Towns, like other corporations, have no powers except such as are expressly or impliedly granted to them by the legislative power of the State.

In the absence of authority so conferred, a town has no power to appropriate money for gratuities to men drafted for the military service of the United States.

But the legislature has power to authorize a town to confirm such action by another vote on the subject, and such confirmatory action of the town will be valid.

The power of the legislature is limited only by the constitutions of the State and of the United States, and by the principles of natural justice.

The provision of the constitution of the State against taking private property for public use without compensation, has no application to the taking of property by taxation. The latter takes money from individuals as their share of a justly imposed and apportioned public burden, and an equivalent is presumptively received in the benefits conferred by the government; the former takes property from an individual as something distinct from and more than his share of the general burden, and therefore the justice and necess ty of special compensation.

It is not contrary to natural justice that all the inhabitants of the State should be taxed for gratuities to a part of their number who are called upon to render military service to the general government.

So far from this, there is an obvious equity in the burden being shared by all.

Every citizen is bound to take up arms in defence of his government if necessary. and the selection of a class only, of a certain age, is arbitrary, and based solely upon considerations of expediency.

Although the State, as such, is under no obligation to aid the General Government in raising an army for national defence, yet the general good of the people of the State is involved in the maintenance of the General Government, and the legislature may properly act for the promotion of this general good.

If the legislature could not tax the people for a gratuity where no possible public benefit would be produced, the case must yet be one of an extraordinary character to justify the interference of the judiciary.

If there be the least possibility that making the gift will be promotive in any degree of the public welfare, it becomes a question of policy, and not of natural justice, and the determination of the legislature is conclusive.

Petition for an injunction.

BUTLER J.—"Towns, like other corporations, can exercise no powers except such as are expressly granted to them, or such as are necessary to enable them to discharge their duties, and carry into effect the objects and purposes of their creation." *Abendroth* v. *Greenwich*, 29 Conn. 363. "They act not by any inherent right of legislation, like the legislation of the State, but their authority is delegated." Daggett J., in *Willard* v. *Borough of Killingworth*, 8 Conn. 254. Such is the law as repeatedly recognized by this court, and it is quite too late to urge for them the possession of any inherent or prescriptive rights or powers, or any rights or powers not expressly or impliedly delegated to them by the legislative power of the State.

When in August, 1863, the town of Woodbury passed the vote complained of, they attempted the exercise of a power which had never been so conferred upon them, and their proceedings were void. But by the act of November 13th, 1863

they were authorized by the legislature to ratify and confirm those proceedings, and they did so ratify them, as the demurrer to the respondents' answer admits. That authority and ratification must dispose of this case if it was competent for the legislature to authorize their confirmation.

The votes complained of appropriated six thousand dollars to be divided among the men who should be drafted to fill the quota of that town, authorized by a law of the United States, and called for by the President, and for the purpose of assisting the citizens so drafted to obtain substitutes, or as a bounty if they personally answered the draft and served; and the votes further provided for raising the money by borrowing. This action involved an ultimate tax upon all the inhabitants of the town, for the purpose of conferring a gratuity upon those who, by the law of the land, owed military service to the United States and were called on to render it, and because to render it was deemed a hardship upon those upon whom the draft had fallen or should fall; and that tax must presumptively fall upon some who were not subjects of military duty under existing laws, or liable to be made such under any reasonable and just law which Congress has power to enact. Was it competent for the legislature to authorize the ratification of such action by the town?

This question seems to be involved in another and higher one, viz., whether it is competent for the State legislature to give gratuities to such of our citizens as are called, under the allegiance they owe to the national government, and independent of the allegiance they owe to the State government, by distinctive and independent national enactments, to render to that national government distinct and independent military service, and tax the citizens generally therefor. For, if they have the power to do it, they may apportion and impose the duty or confer the power of doing it upon the towns.

It is clear that with such action of the general government the State government, as such, has legitimately nothing to do. In authorizing, under the power to raise armies, a national conscription by the national government, the constitution so far forth ignores the State governments entirely; although it is otherwise in respect to the militia, for in regard to their organization and use, by another and distinct clause of the constitution and the laws of Congress enacted under and by virtue of it, the national government and the State governments act together concurrently or in harmony. It is clear, therefore, that the State government, as such, is under no obligation to

aid the general government in such an exercise of its powers, and if it attempts to aid it, is wholly a volunteer. By what principle, then, can the legislative branch of the State government be justified in taxing the people of the State, or authorizing their taxation by towns, to confer gratuities upon persons drafted by the United States?

Not by force of any specific authority conferred by the State constitution; that instrument does not confer any such power specifically. It provides for a collective body of persons, in whom the legislative power of the State shall vest, and by whom that legislative power shall be exercised, as an elective General Assembly, and confers upon them the whole legislative power as inherent in the people, except impliedly such as had been granted to Congress by the Constitution of the United States, and such as the General Assembly are expressly restrained from exercising by the bill of rights.

The question in hand therefore comes to this: 1. Had the people of this State, when they adopted the present constitution of the State, the inherent right, as part of the legislative power, to appropriate the money of all, as a gratuity to the few who should be called at any time by the national government into its independent service; and, 2. If they had such power, have they restrained the General Assembly from exercising it by any of the limitations of the constitution.

It must be conceded that the people, if convened and organized as a whole, and acting upon the fundamental principle that what the majority prescribe shall be law, could be under no restraint except that imposed by the principles of natural justice; and the General Assembly in the exercise of that conferred legislative power, and irrespective of the bill of rights, are restrained by the same principles, and no other. The first question, therefore, may be further narrowed to the inquiry, whether it is contrary to natnral justice that A and B, and the rest of the inhabitants of the State, should be taxed for gratuities to C and D, when C and D are called upon to render military service to the general government. It should be observed that the bounty contemplated in the case put, as in this, differs from the bounty given by the United States, for that is in part payment for the service. It differs also from any bounty given to the militia in case they are turned over and mustered into the service of the United States, for the organization and support of the militia is the concurrent duty of both governments. It differs also from the case cited from Root (*Hitchcock* v. *Litchfield*, 1 Root, 206), for there the

troops were raised by the State, and the State apportioned and imposed the duty upon the towns. It differs also from a case of bounty to volunteers raised by the State, and turned over to the service of the United States, for in this instance, although the call was apportioned by the general government, for purposes of equality, among the States, districts and towns, it was apportioned and imposed directly upon the people as individuals, and not upon the States, districts and towns. The case is therefore entirely new, and the question returns, could the people as a whole, if they had retained the whole legislative power, by a major vote, tax A and B and the rest, to give a gratuity to C and D, because C and D were drafted by the United States; and if an infringement of the principles of natural justice, is it such an infringement that it is our duty to hold the law inoperative. Very clearly such a vote would not be such an infringement, for several reasons.

In the first place, if it be conceded that it is not competent for the legislative power to make a gift of the common property, or of a sum of money to be raised by taxation, where no possible public benefit, direct or indirect, can be derived therefrom, such exercise of the legislative power must be of an extraordinary character to justify the interference of the judiciary; and this is not that case.

Second, if there be the least possibility that making the gift will be promotive in any degree of the public welfare, it becomes a question of policy and not of natural justice; and the determination of the legislature is conclusive. And such is this case. Such gifts to unfortunate classes of society, as the indigent blind, the deaf and dumb, or insane, or grants to particular colleges or schools, or grants of pensions, swords, or other mementos for past services, involving the general good indirectly and in slight degree, are frequently made and never questioned.

Third, the government of the United States was constituted by the people of the State, although acting in concert with the people of other States; and the general good of the people of this State is involved in the maintenance of that general government. In many conceivable ways the action of the town of Woodbury might not only mitigate the burdens imposed upon a class, but render the service of that class more efficient to the general government, and therefore it must be presumed that the legislature found that the public good was in fact thereby promoted.

And fourth, it is obviously possible, and therefore to be in-

tended, that the General Assembly found a clear equity to justify their action.

Every citizen is bound to take up arms when necessary in defence of his government, not as a matter of strict law, but as an incident of citizenship; and the selection of a class only, of a certain age, of whom that service is to be immediately demanded in a particular case, although wise, is arbitrary, not based on any peculiar or special obligation resting upon the class, or on their ability alone to render the service, or to render it with less pecuniary or social sacrifice, but on the wants of the government, and the supposed fitness of the class to subserve the purposes of the government with more efficiency than others. But if all owe the service, and it is for the common good, and there is the usual provision that it may be rendered by substitute or commutation, it is not easy to see why men above forty-five years of age, if able-bodied, may not be called upon, as well as those of less age. If not as able to endure the hardships of the field, they may answer equally well for garrison duty or as details; and presumptively they are better able to procure substitutes or commute, for they have more generally accumulated property or received it by inheritance. Indeed, if substitution and commutation are made elements of the conscription, and they were of the law in question, the *ability* to procure a substitute or commute may well be an element, without regard to age; and, therefore, when all above a certain age are exempt, they are favored, and it is clearly equitable and just that they equalize the burden by bounties to those who are drafted and serve, or by making provision for the support of their families. On this obvious equity rests the general law making provision for the families of all drafted men and their substitutes.

As, therefore, if the people of the State collectively had retained all that portion of their legislative power not delegated to the Congress of the United States, it would have been competent for them to pass votes in reference to all the drafted men of the State like those which the respondent town passed; and as they have delegated their whole remaining legislative power to the General Assembly, with certain exceptions contained in the Bill of Rights, it was competent for the General Assembly to do so, and therefore it was competent for them to delegate that power to territorial districts of the State or towns, and, of course, to authorize the towns to ratify votes of that character which they had passed, without seeking beforehand such delegation of authority, unless the Assembly are restrained from

the exercise of that power by some clause in the Bill of Rights contained in the Constitution. And this leads to the second question, viz., whether there is any such prohibition in theBill of Rights.

The clause relied upon by the petitioners is that which inhibits the "taking of private property for public use without just compensation." But it is clear that the law in question was not passed in contravention of that clause of the Constitution. The votes of the town did not contemplate the taking of any property within the meaning of that clause. They appropriated money as a bounty or gratuity, and authorized the selectmen to borrow it, and the legislature authorized them, by the act of November 13th, 1863, to lay a tax to pay it. If it be conceded that the money must be raised by tax, and that as a necessary consequence appropriating the money was equivalent to laying a tax, still, the action of the legislature was not within the clause. Exacting money by taxation and taking private property for public use, are different things. Both, it is true, are in one sense the exercise of a right to take the property of individuals for public use, but there is a broad distinction between them. Taxation exacts money from individuals as their share of a justly imposed and apportioned general public burden, and the equivalent is presumptively received in the benefits conferred by the government. Property taken for public use from one or more individuals only, by right of eminent domain, is taken not as his or their share of an apportioned public burden, but as something distinct from and more than his or her share of the public burdens, and therefore the justice and necessity of a constitutional provision for compensation. The clause referred to has no bearing on the case.

The superior court must be advised to overrule the demurrer to the answer and dismiss the bill.

In this opinion the other judges concurred.

DIGEST OF RECENT CASES.[1]

Practice.

A judge, in cases where he thinks it proper, may order a a notice, *de bene esse*, to be given to the adverse party, different from that ordinarily required by the rules; and if such notice is not objected to, or if it is affirmed by the court, it will be held sufficient.

Where, by statute, the day of meeting of the mayor, aldermen and city council for the election of city clerk is appointed to be upon the same day on which the city officers elect are required to assemble and take the oath of office, one-half of the aldermen cannot defeat a legal election by absenting themselves for the purpose of leaving that board without a quorum.

They are bound to be present at all times when the board is in session, till the election is made; and if a recess or adjournment to a later hour is voted, they are bound to take notice of the time of meeting.

They are bound to take notice of the time appointed for the election of a city clerk as of an adjournment.—*Kimball* v. *Marshall*, 44 N.H. 465.

The mere inspection of a book, produced on notice, by the party calling for it, does not make it evidence for the party producing it.

The plaintiff, while testifying, produced his deceased father's rent book, upon the request of the defendant's counsel.

Held, that the inspection of the book by the defendant's counsel did not make it evidence for the plaintiff.

Entries by A, a deceased landowner, upon his rent book, charging B and C with the rent of certain premises and crediting them with the payment of the same, are not evidence for the heir of A, of a tenancy by B, in a suit brought by the heir for rent of the same premises against B, who had continued to occupy them with C after the death of A.

A party is not estopped by his declaration as against one

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[1] These abstracts have been taken from the reports of recent English cases in the different periodicals, mainly from the *Weekly Reporter*, an excellent and reliable journal of legal matters, from advance sheets of the official reports, kindly furnished us by the reporters of the various States in which the decisions were rendered, and from reliable legal journals in this country.

who is not thereby induced to take or neglect any action, or in any way alter his situation.

An arrangement between B and C for "mutually keeping house," by which C is to pay the house rent and butchers' bills, and B is to pay the other bills for the family expenses, does not as matter of law make B and C partners, or authorize C to bind B to third parties for the rent.

Where a tenant at will from year to year lets a portion of the premises held by him to another as his tenant at will, the latter is his under-tenant, and not his assignee.

One, who is tenant strictly at will, has no assignable interest in the premises of which he is such tenant.

Where C holds certain premises as tenant at will of A, the mere fact of B's entry upon and occupation of a portion of the premises under C, does not necessarily make B a tenant of A. —*E. H. Austin* v. *Robert Thomson*, N.H. Supr. Court, Strafford County, Dec. T., 1863.

Intelligence and Miscellany.

Our English exchanges often contain lists of questions propounded to candidates for admission to the bar. We think our readers may be interested in the following questions and answers, which we copy from accurate minutes of portions of a recent examination in Boston of an applicant for admission as an attorney:—

Question. How long have you studied law?

Answer. Seventeen years.

Q. Does a writ of entry ever lie in this Commonwealth to recover land?

A. I can't fix my mind on any writ by that expressive name. I don't see why it might not, under the practice act. I have not a clear idea in regard to it, but think it might lie in some cases. I think the statute goes rather in the form of a petition than a declaration to recover land.

[The applicant afterwards said that in regard to this question he was confused at the time it was put; and on reflection, during the intermission, he was satisfied that the writ would lie.]

Q. If two persons own land together, how would one of them get his share set off to him?

A. To divide land, a petition in equity should be brought in the Su-

preme Court. A court of law would have no jurisdiction.

Q. Have you paid a good deal of attention to matters respecting land?

A. Yes.

Q. If a writ of entry can be brought, how should the defendant proceed, in order to deny the plaintiff's title, and set up a title in himself?

A. That would depend on the manner in which the plaintiff commenced. It would be by a special plea in bar. Under our statutes it is called an answer.

Q. Have you read anything on wills?

A. Yes, Wells on Wills; I think that is the name.

It is necessary to have witnesses to a will; sometimes four. There must be three, independent of those who claim under it. It is not necessary that any legacy should be given to the witnesses to make them competent. They must be independent. A man's children could not be witnesses to his will, if he left them his property. There would, however, be a remedy in equity in such a case, by a petition asking the court to do whatever equity would require, and the court might then prove the will, and in their discretion give to the children just such parts of the property as were devised to them, though they were the only witnesses. This equitable remedy is confined to such as would be heirs-at-law if there were no will. A stranger would not have it.

Q. If all are not joined as defendants who should be, in an action of contract, can those who are sued do anything about it?

A. They may plead the non-joinder in abatement, and must name all the persons who ought to have been joined.

Q. If all the proper plaintiffs are not joined, what then?

A. The defendant should plead in abatement, otherwise he cannot bring it to the knowledge of the court. If it appeared on the face of a note which was sued, that it was given to six persons, and only three were plaintiffs, the defendaut might demur.

I have read Cowen and Hill's notes, on Starkie's Evidence, I think.

Q. How does an indorser on a promissory note become liable?

A. It is by force of the statute.

Q. What is an indorser?

A. One who signs with the person who gives the note, and guarantees payment. To make him liable you must make a demand of the drawer within a reasonable time after the note becomes due. You may make the demand the next day after it becomes due, or you need not until just before six years are out. Your chance of recovery of the indorser would be slight if you should wait six years, or five, before making the demand on the drawer, because you would thereby show *laches*. If you should wait ten or fifteen days, or thirty or forty-five days, there would be no doubt at all that you could recover. This question of time would depend on the *lex loci*. If you live in New Bedford, and the maker in Boston, and the custom in New Bedford is fifteen days, and in Boston ten days, you might follow either custom. There is no settled rule of law as to this.

Q. What is the liability of the indorser of a writ?

A. That name is not given in bringing a writ. A writ should be signed by the clerk.

Q. Do you understand the Latin phrases used to describe writs?

A. Yes.

Q. For an assault and injury to the person, would you bring trespass *quare clausum*, or trespass *de bonis*?

A. Trespass *de bonis*, of course. Trespass *quare clausum* applies to land.

Q. Suppose a man is knocked down and dragged out, and in addition his garments are torn, would trespass *quare clausum* lie?

A. No. You should bring trespass in the case. If you put in trespass *quare clausum fugit* also, you must elect which to proceed upon.

I have done something at conveyancing. A will need not have a seal, but a deed must. I always advise putting a seal on to both deeds and wills. I think a deed would convey land without a seal; but it might require equity consideration. A deed without a seal could be made to stand in equity. This is in consequence of a statute which provides that formality shall not vitiate anything. I can't now put my finger on that statute.

The words "Know all men by these presents" are not necessary in a deed, under the statute. A man can make a verbal deed or will on his death-bed.

Q. Is it necessary to use a printed form in drawing a deed, or can you write one on a common piece of paper?

A. I cannot draw a deed on a common piece of paper. The form would be necessary for me. But if the deed was prepared by an ignorant person, the court would not throw it out because it was not written on such a form. A lawyer, however, must use the regular forms, such as, "Know all men by these presents." If a paper is poorly drawn, it is presumed that a lawyer did not do it.

Q. Suppose it was shown as a fact that it was drawn by a lawyer?

A. In that case it would not find much favor in court.

Trespassers are liable jointly and separately. But you could not bring separate actions against them all. The court would compel you to consolidate them. There can be only one judgment for the same injury, whether the suits are collected or not. You can't bring separate actions, and get verdicts against them separately, and then collect the largest verdict. That would be to encourage litigation.

Q. What is the difference between a writ of habeas corpus and personal replevin?

A. If a man has my child, and won't give him up, I may bring personal replevin, but not habeas corpus. The latter is brought against officers of the law. Personal replevin is brought against persons not officers of the law.

Q. Suppose you build a house on another man's land, and somebody moves it off, could you bring trover for it?

A. No, not under any conceivable idea of law. Trover is founded on the idea that something has been lost. There is no action in Massachusetts by which the building could be recovered. There is such an action in England, called *detinue*. I should sue here for trespass on the case.

Q. What is burglary?

A. Breaking and entering.

Q. Is it burglary to break and enter a barn in the day time?

A. Yes. But the punishment is greater, if in the night.

If a man sells intoxicating liquors, not knowing them to be intoxicating, it is no offence So it would not be adultery for a married man, who supposed his wife to be dead, to have intercourse with another woman. The reason is, because crime must always be conceived in the mind before the overt act. The rule as to misdemeanors, like petty larceny, is different from that as to crimes. One may be punished for misdemeanor, irrespective of intent. In murder, intent must be proved. But if a man supposes his wife to be dead, adultery is like exusable homicide.

Q. How old must persons be, to make their marriage valid?

A. A man must be twenty-one, and a girl eighteen, if the marriage is made by a contract between these parties. If under that age, it may be done with the assent of parents or guardians. Otherwise, it is invalid, and they may separate and marry others, provided they do not cohabit together after they become of proper age. Such cohabitation would make it all right. I have been in a case in which it was necessary to look this up.

The common law of Massachusetts is the common law and statute law of England, as far as it applies, but not running further back than Henry III.

Q. What must be proved, to sustain a writ of dower?

A. That the woman was the legitimate wife of the man, and that she was living properly. If she was living in a brothel at any time before his death, without his consent, she could not recover. After his death, she might do as she pleased.

Q. Within what time must a writ of dower be brought?

A. At any time after forty days from the husband's death. She has a right to stay in the house for forty days, and cannot bring her action within that time.

Q. Could she bring a writ of dower after marrying a second husband?

A. No.

Q. Why not?

A. Because a dowager is only a lifetime thing, and is supposed to return to the legitimate heir. A dowager is one-third of the rents and profits of all the estate.

Q. Suppose a woman, after her husband has been absent and unheard from for seven years, marries again, and has children by her second husband, and her first husband then returns; which husband would have the right to her?

A. The first, of course.

Q. Why so?

A. There is a presumption of death after seven years' absence, and both marriages are, therefore, valid; and the prior contract would prevail, and the first husband can take her or leave her, as he prefers, at his free will.

Q. Suppose he takes her, would he be obliged to take her *cum onere*, that is, with her children by the second husband?

A. He would take her just as if she was a widow. He would have to support the children while they are of tender years, until they are twenty-one.

Q. Would those children be illegitimate?

A. No.

Q. Why not?

A. The law told her she might get them if he stayed away seven years, and so she done so; and the law protects her in the children she got by another man.

Q. Would such children inherit the estate of the second husband?

A. Yes.

Q. Could the first husband maintain a libel for divorce?

A. No.

Q. Why not?

A. Because she has done nothing contrary to law.

Q. Have you read some books on equity?

A. Yes.

Q. If a man has promised to marry a woman, and then refuses to do it, within what time must she bring a bill in equity to compel the specific performance of the contract to marry her?

A. That must be done within three years.

Q. Suppose there has been a part performance of the contract, by their having intercourse together?

A. Then it should be done sooner than three years; and a court of equity would certainly compel him to marry her. I have known of such a suit as that.

Q. Suppose that the man has married another woman?

A. Then the court would not compel specific performance, but would award damages.

Q. What contracts are void by the statute of frauds?

A. All contracts to do things which the law says shall not be done. The statute applies rather to civil business.

Q. Give an illustration of a contract void by the statute of frauds.

A. If a man agrees to pay usury, that would be void by the statute of frauds.

Q. Would it make any difference whether the contract was in writing?

A. No. Any contract which can be performed within one year need not be in writing.

Q. Would it make any difference if it was a contract to sell a house?

A. No. If it was to be performed within a year, it need not be in writing. But if not in writing it should be proved by two witnesses.

Q. If a man marries on the strength of a recommendation of the woman, which he alleges to have been false, and he brings an action against the person who recommended her, to recover damages, can he sustain his action simply by proving that the recommendation was false, or must he also show fraud?

A. Such an action as that would not be maintained unless the person who gave the recommendation had an interest in the matter; as, for example, if the woman hired him to recommend her. It might be for a misrepresentation as to the amount of her property, but not for one as to her character.

Q. Suppose he recommended her as chaste, and she proved to be with child by him?

A. In that case the husband would recover smart damages.

Q. What must you allege in bringing such an action?

A. That the recommend was given wickedly and maliciously.

Q. Would it be necessary to show that the recommendation was in writing?

A. No. If not in writing, it should be proved by two witnesses, or it might get throwed out of court.

Q. What is meant by "civil law"?

A. I have often thought that people put these words into books when they did not know what it meant. They use it as meaning any law not criminal. But civil law is Roman law, we have got a good deal of it. It is

in Norman French. We owe it all to William the Conqueror. He brought it over.

Q. Who may bring a writ of entry?

A. Any person entitled to any corporeal hereditament.

Q. If a tenant stays in a house after his time is up, how can you get him out?

A. By a common writ and summons; not by a writ of entry.

Q. What would it be necessary to allege?

A. You should state the facts in the writ, and that is all that is necessary.

Q. What have you got to do, before you bring such a writ?

A. Go to the clerk's office and give five cents for a writ, and fill it up. That is all. To obtain a writ of entry, you must file a petition in the supreme court, and get them to issue it.

Q. Suppose you lease a house to a man orally, how can you get him out, if you wish to do so?

A. If it is for less than a year, I cannot get him out, because I cannot change my mind about it. If it is for over a year, it is void, and I can get him out any time.

Q. How would you foreclose a mortgage?

A. There are two ways. One is, to go right in, and if he is fool enough not to push me, and I stay in with him three years, that is a foreclosure. The other way is, to go with witnesses, and give notice, and record the notice. If he objects to letting you go on to the land with the witnesses, you must go as near as you can, and read the notice to him. There is one other way to foreclose a mortgage, namely, by petition to the supreme court.

Q. What are the forms of action in this Commonwealth?

A. Trespass, trespass on the case, tort and replevin.

A common carrier would be liable for goods lost by theft, but not if taken by soldiers, or armed rioters, or burned up in his house without his fault. It is enough if he takes the same care of them that he does of his own.

Q. What are the different kinds of bailments?

A. There is the common bail bond, and bail given in criminal cases, and when persons undertake to conduct suits when they live in another State; bail also has to be given by executors, sheriffs, and other officers.

Q. Is there any other kind of bailment known here?

A. I think there is. It now slips my mind what; but collateral securities held for moneys, and such.

Q. What is a pledge?

A. An article left in lieu of money or other favors.

Q. What must a man do who receives a pledge, to preserve his claim upon it?

A. He must make a record of it, and receive only a certain amount in proportion to the value, and give four days' notice before selling it.

Q. What was the right of a pledgee at common law?

A. If the pledge was not redeemed, he would have an absolute right to it.

Q. Suppose you pledge your watch to me, and I afterwards let you have it to wear for a day, and you come back and refuse to return it to me; what can I do about it?

A. Why, that would be a swindle. You could use force to take it back from me, just as much as if it were

bank bills which I had just taken from your drawer.

Q. If a man agrees to sell you one hundred bushels of corn, at one dollar a bushel, out of a large cargo, and fails to deliver it, what can you do about it?

A. Sue him. The damages would be the value of the corn.

Q. Does it make any difference whether you have paid him or not?

A. No.

Q. If you should refuse to take the corn in such a case, what can the seller do?

A. I should be liable for all I agreed to give for it.

Q. Does it make any difference whether the contract was in writing, or what the price was?

A. No.

Q. Could you bring tort or replevin?

A. I think not, if the corn was not separated from the rest of the cargo.

Q. Suppose it was one hundred barrels of flour, out of a large cargo?

A. I think replevin would lie, because the barrels of flour are distinct from each other.

Q. Would the price make any difference?

A. No. But you would need at least two disinterested witnesses, and ought to have three.

Q. How many witnesses are necessary to prove adultery?

A. One disinterested witness, to swear he saw the parties in actual, naked, physical contact. I heard a judge in Connecticut lay down the law stronger than that once.

Q. Does it make any difference in the value of a note whether it is witnessed or not?

A. A witness is only important to prove the handwriting.

Q. Suppose the handwriting is admitted?

A. Then the witness is of no importance.

Q. How many witnesses are necessary to a deed, in this Commonwealth?

A. Two disinterested witnesses. It makes no difference whether it is a deed of warranty or quit-claim.

Q. What is the difference, if any, between an indorser, surety, and guarantor of a note?

A. These are merely different names for the same thing. It makes no difference whether their names are on the face or back of the note, provided you add the word "surety," if the name is on the face. If one signs on the face of the note, adding to his name the word "surety," notice must be given to him before suing him, and exertions must be used to get it out of the principal. Otherwise you are guilty of *laches*.

Q. Are any special words necessary in a deed?

A. "Grant" is necessary, both in deeds of warranty and quit-claim. "Convey" is also indispensable; although, perhaps, you might get a substitute for it.

Q. Are the words "to have and to hold the same to him (the grantee), his heirs and assigns forever," of any importance?

A. No; those words are surplusage. The addition of those words does not affect the value of the estate conveyed a particle, in my judgment, under the present law of Massachusetts. Under the old law, I don't know but learned lawyers might show out of the books that all those words had some meaning.